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Department of LAW

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Vancouver, Canada

Date 26/9/94
Abstract

In contemplating social change in the context of policy development and legal decision-making we are necessarily led to consider what the limits are to such change. And it is not surprising to find this issue gaining widespread currency in contemporary legal and political debates, especially when viewed against the background of the growing number of new social movements: feminism, critical race, anti-poverty, environmentalism, and so on. Our thesis suggests that a psychoanalytic approach can successfully contribute to this critical discussion.

In a first approach, our thesis develops some basic psychoanalytic categories, such as ‘fantasy’ and ‘identification,’ to show how Lacan’s view of the subject as a lack yields some surprisingly fruitful insights. What we have in mind here is his view that the subject is not a fully-formed individual with a clear and undisputed will. Rather, Lacan suggests that it is the very absence of a concrete will which defines the human subject. These insights are further developed in relation to the standard theoretical categories of ‘power relations’ and ‘structural constraint’. We thus demonstrate, for example, how psychoanalytic ideas can further the debates over ideological critique and ‘false-consciousness’.

Now, in making our analysis relevant to contemporary political and legal scholarship, we have applied our theoretical framework to the discussion of the rights discourse. We find that many of the impasses centering on the public-private issue; on the formal versus substantive opposition; on the question of whether rights reproduce the
capitalist mode of production; can be usefully portrayed in terms of the assumptions that underlie legal positivism and legal postmodernism; and we show how Lacan can provide us with a much-needed alternative account of the rights phenomenon. In this new formulation, rights users are tied directly to the subject-as-lack. And, contrary to a reactionary interpretation of this new formulation which might point to an apparent pessimism and apathy, we find that our narrative opens up the way to a highly productive and passionate ethics.

We immediately see the relevance of such contemplations to political and legal strategists. We argue that Justice is impossible in the strictest sense of the term, and that our proposed ethics provides us with a means to cope with this knowledge. We suggest adopting a paradoxical stance in which Justice is conceivable, and in this sense possible, on the basis of a constitutive impossibility. Our thesis demonstrates how the work of Slavoj Zizek, Ernesto Laclau, Chantal Mouffe, Joan Copjec, and Renata Salecl, provide us with a panoply of remarkably sophisticated (Lacanian) theoretical tools for the purposes of presenting this paradoxical relationship.
# Table of Contents

Abstract ................................................................. ii  
Table of Contents ....................................................... iv  
Acknowledgments ......................................................... viii  
Abbreviations ........................................................... vi  

**CHAPTER ONE: Setting the Stage for a Lacanian Displacement** ........................................ 1  
  Introduction .......................................................... 1  
  A Chapter Itinerary .................................................. 6  
  A Thesis Itinerary ................................................... 7  
What is Psychoanalysis: Toward a Science of the Real ............................................ 9  
Law and Psychoanalysis in Context: A Brief Sketch .................................................. 13  
Toward a Lacanian Psychoanalytic Jurisprudence and an Ethics of Transformation ....... 19  
  Problematizing the Politics of Transformation: Toward an Ethical Discourse of the Analyst 20  
A Survey of Psychoanalytic Concepts .................................................. 25  
  Lacan’s Mathemes ...................................................... 25  
  An Ethics of the Real in the Context of Ideological Interpellation ............................... 31  
  The Subject ............................................................ 33  
  Ethics Revisited: Traversing the Fantasy ........................................... 39  
  Relevance to the Critique of Ideology .......................................... 42  
Specifying the Lacanian Contribution to Legal Theory in the Context of a Transformative Politics ................................................ 46  
  The Subject of Ethics .................................................. 47  
  The Function of Law: Justice or Appeasement? .............................................. 55  
  On Authority .......................................................... 57  
  On the Materialist/Poststructuralist Opposition ............................................ 59  
  On Superegoic Repression and the Desire of Rights ........................................... 64  
  Lacan as a Poststructuralist: Strategies, Power Relations, and Structural Constraint .... 67  
    Power Relations ...................................................... 69  
    Structural Constraint ................................................ 70  
Conclusion ............................................................... 74  
Notes to Chapter One ................................................... 76  

**CHAPTER TWO: Doing Theory** ........................................ 85  
The Logic of the Signifier: Toward a Science of Discourse Analysis ......................... 85  
Sample Readings ......................................................... 98  
  Gay Rights and Gay Strategies .......................................... 98  
  Undecidability and Identification: Politicizing the Legal Categories of Homosexuality and Pregnancy ........................................... 102  
  Emptying the ‘Family’ ................................................. 103  
Postmodernism as the Limit of Modernism: Variations on a Theme ......................... 107  
  On the Onto-epistemological Issue .......................................... 107  
  Fixity versus Nihilism: Anatomy of a false dichotomy ................................... 115
<table>
<thead>
<tr>
<th>Chapter Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>On Power, Resistance, and Structural Constraint</td>
<td>121</td>
</tr>
<tr>
<td>On the (im)possibility of Justice</td>
<td>127</td>
</tr>
<tr>
<td>On Discourse, Ideology, and False-Consciousness</td>
<td>132</td>
</tr>
<tr>
<td>Notes to Chapter Two</td>
<td>135</td>
</tr>
<tr>
<td><strong>CHAPTER THREE: The Law and Politics of Rights and Identities</strong></td>
<td>137</td>
</tr>
<tr>
<td>Rights Discourse: The Traditional Debate</td>
<td>137</td>
</tr>
<tr>
<td>The Critique of Rights</td>
<td>137</td>
</tr>
<tr>
<td>Does Public State Neutrality Mean Invisibility of Private Inequalities?</td>
<td>139</td>
</tr>
<tr>
<td>Rethinking the public/private and political/social dichotomies</td>
<td>141</td>
</tr>
<tr>
<td>Formal versus Contextual Approaches to Resolving Equality</td>
<td>145</td>
</tr>
<tr>
<td>Taking a Closer Look</td>
<td>146</td>
</tr>
<tr>
<td>Do Rights Reproduce the Form of the Capitalist Mode of Production?</td>
<td>149</td>
</tr>
<tr>
<td>Individualism: Alienating or Not?</td>
<td>151</td>
</tr>
<tr>
<td>Abstract Indeterminacy: Beyond Good and Evil</td>
<td>154</td>
</tr>
<tr>
<td>Reification and Objectivity</td>
<td>157</td>
</tr>
<tr>
<td>Conclusion</td>
<td>159</td>
</tr>
<tr>
<td>Rights and the Logic of Desire</td>
<td>160</td>
</tr>
<tr>
<td>Identity Politics</td>
<td>172</td>
</tr>
<tr>
<td>The Process of Identification</td>
<td>172</td>
</tr>
<tr>
<td>Identity and Power: Structural Constraints Revisited</td>
<td>177</td>
</tr>
<tr>
<td>Identifications in Legal Discourse</td>
<td>180</td>
</tr>
<tr>
<td>On Representing Interests</td>
<td>184</td>
</tr>
<tr>
<td>Notes to Chapter Three</td>
<td>187</td>
</tr>
<tr>
<td><strong>CHAPTER FOUR: The Real as an Internal Moment of the Political</strong></td>
<td>194</td>
</tr>
<tr>
<td>The Political: From Communitarianism to Liberalism to Radical democracy</td>
<td>194</td>
</tr>
<tr>
<td>Three Lacanian Orders: Im -- Sym -- Re...</td>
<td>195</td>
</tr>
<tr>
<td>...And Their Relation to the Political</td>
<td>198</td>
</tr>
<tr>
<td>Utilitarianism</td>
<td>204</td>
</tr>
<tr>
<td>Specifying the Radical Democratic Anti-Utopian Utopia</td>
<td>214</td>
</tr>
<tr>
<td>Role for the Progressive Legal Scholar</td>
<td>224</td>
</tr>
<tr>
<td>Problematizing Strategy and Targeting a Radical Democratic Strategy</td>
<td>236</td>
</tr>
<tr>
<td>Notes to Chapter Four</td>
<td>244</td>
</tr>
<tr>
<td>Concluding Remarks</td>
<td>249</td>
</tr>
<tr>
<td>Selected Bibliography</td>
<td>253</td>
</tr>
<tr>
<td>Appendix: Lacan’s Graph of Desire</td>
<td>261</td>
</tr>
<tr>
<td>Notes to Appendix</td>
<td>267</td>
</tr>
</tbody>
</table>
Abbreviations

<table>
<thead>
<tr>
<th>Code</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>HSS</td>
<td>Laclau, Ernesto, and Chantal Mouffe, Hegemony and Socialist Strategy: Towards a Radical Democratic Politics (London: Verso, 1985)</td>
</tr>
<tr>
<td>Abbreviation</td>
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</tr>
<tr>
<td>--------------</td>
<td>-----------</td>
</tr>
</tbody>
</table>
Acknowledgments

But for Professor J. C. Smith (my primary supervisor) this thesis would not have been possible -- in too many ways to even attempt to list or give justice to. Introducing me to Jacques Lacan has made him responsible for the single most traumatic encounter that has ever befallen me. In doing so, however, he has also made possible the birth of a new and rewarding world-view. His unwavering faith in my efforts to grapple with the little bit of the real provided a constant source of anxiety -- but a productive kind of anxiety whose effect was the generation of new master signifiers and new meanings.

Another big ‘but for’ comes in the form of a proper name: Professor Joel C. Bakan (my secondary reader). Only he knows how his introducing me to the work of Ernesto Laclau and Chantal Mouffe has resulted in a profound mutation in my theoretical and academic trajectory. His productively critical and insightful commentary also helped me refine many issues and give focus to the thesis.

I also thank Karin Mickelson; mom, dad, and Byron; and Angela; all of whom were a constant source of support and encouragement.

Finally, I thank my refrigerator which developed an uncanny knack at producing little tid-bits of edibles when least expected but when most needed.
I love you, but, because inexplicably I love in you something more than you -- the *objet petit a* -- I mutilate you.

*Jacques Lacan*¹

[M]y frank opinion is that [Lacan] was a conscious charlatan, and was simply playing games with the Paris intellectual community to see how much absurdity he could produce and still be taken seriously.

*Noam Chomsky*²
CHAPTER ONE: Setting the Stage for a Lacanian Displacement

Introduction

What causes change? What induces us to want change? What is it in others, in ourselves, in discourse, that unsettles us; that triggers our will (to power)? Why do we desire? Jacques Lacan has a precise answer to these questions: the objet petit a.

As our thesis unfolds, we will see this little object develop into a psychoanalytic category of thought of surprising theoretical clout. It will provide us with the necessary ‘missing link’ to tie psychoanalytic concepts such as identification, subjectood, and ethics to contemporary theoretical issues surrounding progressive social change. The relevance to the new social movements and minority critical legal studies, therefore, should be apparent. Indeed, we could say that, though our primary reference materials consist of theoretical texts, the vector of our work points toward the new social movements: feminism, critical race, environmentalism, anti-poverty, peace, etc.

In general terms, we could say that the aim of the new social movements is to effect some meaningful and concrete changes at a grassroots level (to close the income discrepancy gap, to make the world a physically and psychically safer place to live in for
women and sexual and racial minorities, and so on). Now, in an effort to discern whether such contemplations are utopian in the negative sense (i.e., naive and impossible) or utopian in the positive sense (i.e., tangibly possible), critical scholars have turned to a multiplicity of disciplines for assistance in mapping out possible approaches. Rapidly attaining hegemonic status are conceptual tools drawn from disciplines which have already accepted and assimilated the poststructural and postmodern ethos. Indeed, current critical literature indicates an almost obsessive compulsion on the part of their authors to eschew phrases and ideas that might betray the slightest trace of essentialism or metaphysics. And, of course, the recent theoretical backlash against Catherine MacKinnon evidences this tendency.

Taking centre stage in this new wave of theoretical rethinking is the notion of ‘social construction’: the idea that objects and identities have no meaningful existence outside of discourse; that there is no ‘pre-discursive’ reality; that nothing *meaningful* exists beyond the language games we engage in. Such a premise, of course, carries profound implications *vis-a-vis* one’s world view, way of life and, consequently, strategy considerations. Nevertheless, it seems that, in the current struggle among competing philosophical schools of thought, European continental philosophy (especially that of Derrida and Foucault) is steadily marching toward the limelight.

We can see, therefore, why, at least at the level of explicit theory, current legal scholarship is engaged in a more or less concerted effort to bury any remaining vestiges intimating the presence of natural law or legal positivism. Critical legal scholars have deconstructed court judgments to reveal how underlying assumptions constantly subvert rational argumentation and how, ultimately, legal reasoning is circular. The question then becomes what is it that sustains, pins down, legal argument? If reason and logic are not sufficient for grounding legal argument, what is? In an attempt to answer this question, law and society scholars have endeavoured to open up legal theory to virtually all other
social domains. In moving away from notions of legal autonomy and legal relations, social relations have increasingly become the focus of study. In this view, social relations comprise a multitude of dimensions of which the legal dimension is only one, and the key to understanding the justificatory process (and thus legitimating power) of the legal discourse comes from an examination of the interrelationship of these dimensions.

It is acknowledged that making social relations the analytic unit of legal theory is helpful in bringing about a crucially important shift in perspective. It shows us, for example, that a narrow focus on legal materials is no longer adequate in achieving a comprehensive understanding of the legal decision-making process. Our thesis, however, proposes that, though such a move is necessary, it is not sufficient to the analytic task. Nor does its theoretical framework offer us any insight or guidance with respect to the contentious issue of social transformation, especially from the progressive standpoint. We argue that what is missing from contemporary debates in legal theory is a proper problematization of the process of identification which frames the very social relations that many theorists take as their starting point.

However, we are not simply concerned with creating a typology of the various modes of identification that we engage in. Indeed, investigating the discursive mechanisms that are responsible for the construction of the multitude of subject positions making up social relations is fast becoming an academic commonplace among legal theorists. Rather, we are more interested in such processes of identification inasmuch as they constitute mechanisms of escape. But escape from what? The Lacanian contribution to theories both of law and of transformation can be seen as providing an answer to this question. We will argue that detailed considerations of the twin concepts of subjecthood and ethics are the crucial elements that are absent from contemporary legal debates.
Our starting point in establishing a theoretical framework is the work of Laclau and Mouffe (HSS) which conceives the political and social field in terms of signifiers and social antagonisms. Their opus will operate as a kind of background common sense upon which a Lacanian approach to legal theory will be developed. It is their theorization of the social antagonism which is responsible for their famous statement that 'society does not exist', i.e., that society as a fully sutured entity and in complete identity with itself is an illusion of the (Lacanian) imaginary order. Society is always traversed by social antagonisms which surface as antagonistic relations such as those between the capitalist and socialist, industrialist and environmentalist, patriarch and feminist, etc. Now, if we add to these observations pertaining to political theory the fact, as the Realists and Critical Legal Scholars never tire of pointing out, that law constitutes an important site for political and ideological struggles, the relevance of their comments to legal theory should be clear.

The Lacanian contribution to poststructural political theory can perhaps be framed in terms of the subject. Postmodern and poststructural theorists have properly interrogated the notion of an essential, unitary, and autonomous subjecthood. However, from Zizek’s perspective, the standard poststructuralist notion of the subject needs to be revised or, more precisely, emptied. In psychoanalytic theory the subject represents the asymptotic limit of the process by which each of the substantive subject positions occupying the empty space is removed one by one. In other words, the psychoanalytic subject is a lack or, alternatively, the split between its substantive content and its empty form. So, it is in this homologous sense, that we argue that legal theory has not adequately problematized the subject, and that Lacan, through Zizek, can provide the impetus for remedying this deficiency. The idea is to inquire more precisely into the nature of the subject and to show how its constitutive split (between the subject of
enunciation and the subject of the enunciated) is none other than the Zizekian fetishistic split between (unconscious) real knowledge and (conscious) symbolic belief.

In the context of a transformative politics, the question that is at the forefront of such an inquiry is ‘why are deconstructive readings not sufficient?’ I.e., why is the staging of a category’s discursive overdetermination not often sufficient to diffuse our tendency to cling to an ‘irrational’ essentialism, to treat ‘woman’, for example, as a category with an intrinsic property that justifies physical or mental abuse? Why is it not sufficient to point out the inconsistent, irrational behaviour in order to effect change? Why does mere knowledge (at the level of the signified) of inconsistent behaviour do little to disrupt a certain pattern of behaviour? Indeed, how is it that the notions of ‘irrationality’ and ‘inconsistency’ are attributed to some but not other modes of behaviour? In engaging with Lacanian psychoanalysis we hope to show how a prioritization of the signifier over the signified can help us access, and come to terms with, the real of our subjecthood, our internal antagonism, our own extimate blockage, our jouissance. For psychoanalysis deals with that which escapes the signification process: jouissance (enjoyment). Its function is to locate and assume this surplus enjoyment by examining its traces in the discursive medium (repetition, inconsistencies, paradoxes, circularity).

We can now answer the question we posed earlier. The mechanisms of imaginary and symbolic identifications constitute means of escape from, or veiling of, the real dehiscence of our subjecthood (or the inconsistency of the symbolic Other). The ethics of a feminine jouissance, therefore, suggests the assumption, rather than repression or eradication, of the fetishistic split with which the subject is marked.

As already mentioned, the necessity of a review of the subject stems from the observation that symptomal (i.e., deconstructive) readings are not sufficient to effect change; from the perspective of critical legal theory (including the new social movements) we need also to identify with the symptom by recognizing the way we enjoy
the symptom. This corresponds to the final moment in the psychoanalytic 'traversal of fantasy', ie., the act with which one can view the symptom as the truth of ourselves, such that a relation is, to use Chantal Mouffe's terms, transformed from an antagonistic one to an agonistic one.

So, to conclude, the aim of our thesis is to rethink traditional and poststructural theoretical concepts from a Lacanian perspective, and to transcribe them into the domain of a transformative politico-legal theory. These concepts include ideas such as subjectivity, identification, ethics, social relations, structure, power, authority, legitimacy, etc. The purpose of such an interrogation will be to examine the potential for a psychoanalytic contribution to current debates in the realm of law. We propose that a Lacanian perspective offers us the opportunity to rethink some basic theoretical concepts and thus to significantly advance the debate in the area of social change by emphasizing the dimension of the real, ie., the dimension which resides in the interstices of knowledge -- an emphasis which would entail a shift in discourse type from the university to the analytic. Our thesis will thus constitute a preliminary inquiry into the limits of theory itself (inasmuch as theory connotes the order of description and prediction) and, specifically, the limits to any kind of strategic-transformative project. The theme underlying our thesis, therefore, urges that legal theory will have much to gain in supplementing the standard (traditional) postmodern poststructural approach with a Lacanian psychoanalytic approach.

A Chapter Itinerary

In order to set the stage for a Lacanian critique of current theories of law and political philosophy, this chapter will address several preliminary issues. First, we will offer a thumbnail sketch describing what constitutes psychoanalysis and its object of
study: In what sense can it claim scientific status? How does Lacan’s re-reading of Freud alter our approach to analysis?

Second, we will briefly outline the manner in which the discipline of psychoanalysis has impinged upon the legal discourse. In effect, we investigate this intersection along two axes: the historical-diachronic axis, and the theoretical-synchronic axis. Third, we will consider, in fairly general terms, in what sense our thesis can be distinguished as a separate and unique locus of intersection: In what sense do we think it offers us a way to advance today’s theoretical debates in law and politics?

Fourth, we will undertake a survey of some basic psychoanalytic concepts such as fantasy, subject as lack, etc., for some familiarity with them will be assumed in the remaining part of this chapter and in subsequent chapters. In explicating these concepts, we will have recourse, as far as is possible, to simple everyday objects and activities, and popular culture. In this part, we will also draw out some implications for the critique of ideology. And lastly, we will attempt to delineate more precisely the Lacanian contribution to legal theory in the context of a transformative politics. In a sense, therefore, this last section could be viewed as a thesis in miniature. We will look, for example, at such issues as authority, power relations, and rights. Its purpose is not so much to be comprehensive as it is to suggest the kind of theoretical displacement we think is long overdue and which our subsequent chapters will try to more fully substantiate.

A Thesis Itinerary

We shall follow our introduction to psychoanalytic theory with a theoretical chapter whose purpose will be to make more explicit its relationship to the laws of the signifier. Chapter two will also explore the relevance of the logic of the signifier to contemporary theoretical debates centering about postmodernism. In chapter three, our
account of the traditional rights debate will suggest that a critique of rights based on the failed materialization of preconceived progressive outcomes is locked into an essentialist mode of thought. We will show how the notion of a split signifier accounts for the remarkable capacity of the rights discourse to transform social relations into political relations of oppression and antagonism. Finally, in chapter four, we examine what kind of progressive politics survives an anti-essentialist critique. We do this by looking at how the three Lacanian orders (imaginary, symbolic, and real) can serve to frame debates within political theory and how such an approach sides favourably with a real ethics of radical democracy. We will then conclude by examining, more specifically, the implications for a progressive lawyerly practice.

As a final note, we wish to make explicit what will soon become obvious from our work. We wish to acknowledge our immense theoretical debt to Slavoj Zizek whose insightful exposition of Lacan's work is without parallel; to Ernesto Laclau for specifying, with the utmost rigour, Lacan's logic of the signifier; and to Chantal Mouffe for her very clear presentation of the debates in political theory, including her own theoretical contribution by way of the radical democratic project. Of central thematic importance to our thesis is the notion of the subject as a (real) lack and the processes of identification meant to appease this lack; the logic of the signifier which accounts for the emergence of the subject as lack; and an ethics of the real which radical democracy aspires to. In this sense, therefore, we could say that our thesis consists of a series of essay-variations on a Lacanian theme.
What is Psychoanalysis: Toward a Science of the Real

Ever since Freud, psychoanalysis has been concerned with human action which does not accord with conscious or rational motivations. Slips of tongue, dreams, obsessive compulsive behaviour, intractable relationships, and uncontrollable addictions were just some of the examples taken as evidence of an agency not normally accessible to the conscious mind: the unconscious. The psychoanalyst was usually called upon to attend to a symptom, i.e., a particular kind of behaviour which struck the individual experiencing it as undesirable. The task of analysis, then, consisted in relating the analysand’s symptom to her/his psychic makeup, often by recollecting and examining her/his family history.

Thus, the psychoanalytic relationship is born out of a desire to understand and eliminate a symptom experienced by an analysand. And the typical psychoanalytic encounter consists of a free-associational recounting of life-events by the patient himself. The idea, of course, is to map out the idiosyncratic symbolic universe (i.e., constellation of signifiers) of that particular person, as the art of psychoanalysis is premised on the fact that every individual is unique. As Jacques-Alain Miller notes:

the analytic attitude is just this: never, never suppose you speak the same tongue as your analysand. Never suppose you know what he means when he says anything: that is, the analyst must suspend the common sense of the tongue. And I believe it’s clear that there is no common sense in psychoanalysis. There is only particular, peculiar sense. Besides common sense, both analyst and analysand aim at the most particular sense valid for this subject, and not for any other. You really don’t know what the analysand means when he speaks. But he came to analysis precisely because he himself suspected he didn’t know what he meant when he spoke. And that is why he offered himself up to interpretation.

Some people use Lacan to say that the analysand speaks in reference to a subject-supposed-to-know what it all means. As an analyst you know nothing about the particular tongue of your analysand. You know nothing more than this: that what he means is what he enjoys.
The stake of psychoanalytic social theory, of course, is that the strictly unique character (and thus symbolic universe) of every individual applies *mutatis mutandis* at the level of the socio-cultural. And this shift is made plausible by acknowledging the strictly social character of the individual. In other words, the subject is *socialized* into an individual through the processes of imaginary and symbolic identifications, i.e., the introjection of *common*, and thus social, signifiers. Notice that what is common is not the *signified* (i.e., the meaning), but the *signifier*.

Now, the distinction elaborated by Saussure between signifier and signified brings us to the question of science in the context of psychoanalysis. In his effort to legitimate psychoanalysis as a science, Freud attempted to trace human behaviour back to a biological-physiological causal nexus, whether of a neurological or libidinal sort. However, until the very end of his life, he felt unsatisfied with these attempts. And it is here that Lacan makes his most important contribution. He devoted much time to re-reading Freud's texts and, in doing so, found in them an implicit yet heavy reliance on the linguistic medium. (After all, the psychoanalytic cure is accomplished by words, not surgical instruments.) Lacan was able to find a resonating coherence in Freud's work when read through the now famous axiom 'the unconscious is structured like a language'. This refers not only to the linguistic transformations of metaphor and metonymy (thus giving a more explicitly verbal twist to Freud's concepts of condensation and displacement) but also to the privileging of the signifier over the signified, and an acknowledgment of the significance of culture in a person's psychic make-up -- a series of significations condensed into Lacan's concept of the 'big Other' or 'symbolic order'. Thus, the well-known psychoanalytic terminology encompassing Freud's castration anxiety, Oedipus complex, transference, etc., came to be understood primarily in terms of signifiers, not biology.

The influx of Saussurian and Levi-Straussian cultural semiotics, therefore, made it possible for Lacan to re-entertain the notion of psychoanalysis as a linguistic, rather than
biological, science. However, far from reducing everything to language, as critics often charge Lacan, psychoanalysis retains its most distinctive feature whose origins stem from the Freudian Id and the repetition compulsion: jouissance. Notorious for its persistent resistance to definition, this concept belongs to the register of the Lacanian real. It is a kind of paradoxical enjoyment in pain (or pain in enjoyment) which both escapes (in the guise of the plus-de-jouir, or objet petit a) and sustains (in the guise of jouissance proper) the symbolic order, and therefore does not belong to the field of meaning.

The two orders of the real and symbolic are, in a certain sense, orthogonal to each other. They are radically external to each other, yet they intersect in a mutually supportive manner. And since meaningful existence (exist-sense) pertains only to the field of the symbolic (but made apprehensible by the imaginary), we have access to the real only through the inconsistencies (slips, paradoxes, symptoms, etc.) that it engenders in the discursive medium. The privileging of the symbolic order, therefore, should not be seen to be a Habermasian attempt to either ignore, gentrify, or eradicate the real in order to attain a communicative ideal, but rather as our only possible means to locate it and accept it in its profound meaninglessness. To radicalize this observation, we could say that communication is a strictly ideological process which is made possible only through a necessary misrecognition, a misrecognition of the real contingency of the interpellative act. It is in this sense that we can say that psychoanalysis deals with that which escapes the signification process. The paradox, of course, is that evidence of this objet petit a can only be found on the level of the signifier. And the trick is to find a way to harness this elusive substance so as to make it analytically useful.

To broach the issue of science again, we might ask how psychoanalysis can claim scientific status when it starts from the presupposition that the foundation of discourse is senseless rather than rationally meaningful. Do we not need an ordered, linear, Newtonian world before we can have any semblance of a science? The answer, of course, since the arrival of quantum physics at the turn of the century, and the more
recent emergence of complexity theory, would seem to suggest otherwise. We can
describe chaotic systems using, for example, non-linear equations, even though we may
not be able to predict outcomes with a high degree of specificity. The task has become
more formal, rather than substantive: we acknowledge the intractability of exact
solutions of non-linear equations, and so we strive to locate and ascertain the form or
pattern of behaviour of chaos itself. Hence, strange attractors, Mandelbrot sets, etc. In
the context of psychoanalysis (or, more generally, discourse and ideological analysis)
such a science might be called a science of contingency, or a science of the real.
Law and Psychoanalysis in Context: A Brief Sketch

The link between psychoanalysis and law as a social discourse should now be clear. The proposition advanced in this chapter is that Lacanian psychoanalysis offers us a set of conceptual tools which allow us to locate and deal with discontinuities in the discursive domain. And though it is acknowledged that psychoanalysis has traditionally been understood as belonging primarily to the realm of personal discourse and transformation, ever since Freud, Marcuse, and Fromm, the argument has been advanced that its conceptual framework is equally relevant at the level of social discourse.

It could be argued that the incidence of the psychoanalytic onto the legal discourse has produced subdiscourses which can be usefully grouped into three categories: those which concern themselves with the origins of law; those which deal with the general nature and operation of law; and those which present psychoanalytic insights as essential justificatory components in the legal decision-making process. The paradigmatic instantiation of the former category, of course, is Freud’s Totem and Taboo. A more recent example, which addresses the first and second categories, is Smith’s Neurotic Foundations of Social Order. Finally, the third category refers to specific contributions that psychoanalysis has made in the reasoning contained not only in court judgments, but also in academic articles and texts. They usually concern specific doctrines of the law. Examples include insanity, temporary insanity and automatism, sexual/gender differences, racism, child abuse, the battered wife syndrome, best interests of the child, etc.

The psychoanalytic renditions of the origins of law can be further classified into two types: a biological type; and a non-biological type tending toward the linguistic. Thus, we have C. G. Schoenfeld who subscribes to a somewhat rigid biologically-
determined origin which can be linked to, for example, the seat of primitive human (Oedipal) emotions and desires, i.e., the limbic brain. In this account, the subsequent evolutionary development of the superego (associated with the neocortex) resulted in the suppression of some of the limbic brain’s functions. So the origin of law can be traced to the ancient taboos against incest and parricide which, “not only were attempts to help block man’s Oedipal wishes, but constituted his first laws as well.” Anthropologically speaking, this translates to the transition from the ‘primal hordes’ in which the powerful ruling male kept all the women to himself, to the insurrection of the sons resulting in the primal parricide (death of the imaginary father) and erection of a totem in his place (emergence of the symbolic father).

There are, however, scholars who caution against a biological reductionism that obfuscates the complexity of human behaviour and feelings. Leonard Kaplan and Robert Miller, for example, examine the psychoanalytic state of anxiety to show that the biologization of psychiatry stems primarily, not from a fuller comprehension of mind dynamics, but rather from the apparent pharmacological successes in treating severe mental disorders such as schizophrenia. Other (economic) reasons for the neglect of, say, a more discourse-oriented psychiatry, include pressure from third party providers (e.g., government and private medical insurance) unwilling to support ‘long-term insight oriented psychotherapy’, and competition from non-medical mental health workers, as in various family and group therapy practices.

Moving on to examine contributions made by psychoanalysis to specific areas of law, we might cite two examples. In the areas of (U.S.) constitutional law, for instance, Charles Lawrence III has proposed that courts ought not be exclusively concerned with intention and material impact in race discrimination cases. Rather, he suggests that a more fruitful approach would consider the cultural dimension of discrimination. He proposes, for example, “a new test to trigger judicial recognition of race-based behaviour.
It posits a connection between unconscious racism and the existence of cultural symbols that have racial meaning. It suggests that the ‘cultural meaning’ of an allegedly racially discriminatory act is the best available analogue for, and evidence of, a collective unconscious that we cannot observe directly.” In short, Lawrence, “urges a more complete understanding of the nature of human motivation”\textsuperscript{21} in the context of race issues.

Taking a psycho-feminist perspective, Barbara Stark examines how conscious and unconscious gender ideologies shape divorce law (mainly through provisions offering very generous judicial discretion) and its impact on women’s concerns, including child custody and post-divorce standard of living.\textsuperscript{22} She highlights three contributions of psychoanalysis to the examination of divorce law. “First, it has been suggested that women internalize the values of the domestic sphere (which thereby become ‘feminine’ values); second, that women as well as men fear and hate powerful women [the ‘all-powerful mother’]; and third, that the dynamics of dominance and submission are gendered.”\textsuperscript{23} At the time of her article, nine of the 39 U.S. state task forces investigating gender-differentiated impact found that “gender bias detrimental to women permeates every aspect of marital dissolution and child support.”\textsuperscript{24}

In considering the broader impact of psychoanalysis on legal theory, we might join Leon Sheleff in noting how sociological jurisprudence provides a link between “the more traditional philosophies of law and the more psychologically oriented approaches.”\textsuperscript{25} Thus, early sociologists of law such as Weber and Durkheim emphasized principles of the same ilk as those in more traditional approaches to jurisprudence, including the usually unquestioned logical operation of law. In 1930, as a contributor to the American School of Legal Realism, Jerome Frank\textsuperscript{26} drew upon Freudian ideas to highlight to the inconsistencies and uncertainties of everyday life, and how law’s function was an ideological one -- a comforting but illusory resolution of disputes in a clear-cut,
objective manner. Thus, "[f]ar from there being a rational law, there are rationalizations of the law."27 Frank was concerned first, to mark the importance of lower court decisions (in contradistinction to the usually-emphasized higher level decisions) in establishing the parameters which characterize the nature of law; second, to explain how exactly "political, economic, and moral factors impinge on a judge’s thinking and decision-making;"28 and third, to expose and explain that "the process of judging [not necessarily only in a court situation] seldom begins with a premise from which a conclusion is subsequently worked out. Judging begins rather the other way around -- with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards finds premises which will substantiate it."29 There is, therefore, at this early time a strong sense that legal argument can be, and is, sustained to a very large extent by non-legal ideologies imported during the decision-making and justificatory process, and whose function is to quell our daily uncertainties and unpredictability.

Writing in 1935, Edward Robinson30 echoed Frank’s sentiments in predicting that "it will be a fundamental principle of the new philosophy of law to recognize that every important legal problem is at bottom a psychological problem and that every one of the many traditions about human nature which are to be found in legal learning needs to be gone over from the standpoint of modern psychological knowledge." “The law is concerned with the regulation, mitigation, and composition of human disputes. The fundamental stuff with which it deals is therefore psychological.”31 Albert Ehrenzweig32 (1972) and C. G. Schoenfeld33 (1973) have also taken Frank’s lead in mining the veins formed by the intersection of psychoanalysis and law. However, as Sheleff points out, there has been no recent, thorough theoretical development in this area.34

As far as a specifically Lacanian take on psychoanalysis and law is concerned, David Caudill is one of a small minority of legal scholars who has attempted to rethink doctrinal law in general from a Lacanian perspective.35 However, it is clear that he
remains locked into a traditional mode of application of psychoanalysis to legal theory. This, of course, involves the convention of tracking inconsistencies and gaps in the legal discourse and attributing to these sites the status of an unconscious importation of external ideologies. Not that this is not helpful. Rather, the point is that it remains within the 'false-consciousness' problematic of traditional modernist ideological analysis. Caudill misses the opportunity to highlight the significant contribution psychoanalysis has to make vis-a-vis the subject. Indeed, he makes frequent reference to the gaps in knowledge and the attempt by the legal discourse to fill in the gap\textsuperscript{36}. He notes, for example, that

the deep structure or foundation of contract doctrine operates like, or is, language. Not only is the gap in a contract filled by language, and not only are the rules for filling the gap textual, but the ground of contract law is mediated by words. In Lacanian terms, contracting parties are caught in the web of the language that will determine who they become.

Judges and legislators attempt to fill in the secondary or incidental gaps of what is assumed to be the primary text of the contract. The gaps, however, contain the meaning of the contract. The contract only hides that meaning. Parties often think of the contract as ordering the situation, but the situation is ordered at the outset by what is not said. Lacan's shift in emphasis teaches that the unsaid is often more important than what is said.\textsuperscript{37}

However, Caudill does not make the link between the gap and the subject as lack, i.e., the function of law in appeasing the discomfort of the abyssal nature of the subject. In this view, the processes by which the gap is filled, though not something we can do without, corresponds to the processes of symbolic identification -- the mechanisms by which the lack is veiled. In other words, he misses the analytical usefulness of the real order by reading Lacan as a structuralist.\textsuperscript{38}

Others who attempt to bring to legal theory some Lacanian insights focus on tracing doctrinal inconsistencies to specific ideological anchoring points in areas such as crime\textsuperscript{39} and sexuality.\textsuperscript{40} Overall, however, there is little theoretical development beyond the immanent critique of critical legal scholars and the ideological analyses of 'law and
society's scholars. More importantly, there has been very little or no effort to relate Lacan's views on the subject/structure problematic to legal theory, a topic of central importance to our thesis.
Toward a Lacanian Psychoanalytic Jurisprudence and an Ethics of Transformation

We could say, therefore, that psychoanalysis and, specifically, Lacanian psychoanalysis, has not yet been systematically invoked to make ideologico-discursive analyses at the level of legal theory and philosophy. As mentioned above, the plausibility of such a project will depend on the extent to which concepts developed to deal with analysands on an individual basis will be found to be relevant on the order of the social. And recently, Slavoj Zizek has attempted just such an application of Lacanian ideas to political theory. In our view his oeuvre demonstrates the analytical power of Lacan's conceptual framework, and especially the relevance of his mathemes: $S1^{42}$, $S2^{43}$, $S^{44}$, $\alpha^{45}$. In a certain sense, therefore, we could say that these psychoanalytic concepts exhibit the property of invariance in moving from the personal to the social, just as certain objects in the field of chaos exhibit the property of self-similarity in moving along the axis of scale.

When discussing topics such as order, predictability, and fairness in the context of law and social policy, one invariably confronts issues of authority, legitimacy, and ideology. Though this confrontation has historically been staged within the confines of only a few isolated disciplines (such as jurisprudence, political philosophy, sociology of law, and comparative law) and within the purview of a small number of scholars, the issues have now such wide currency it is hard to find a legal scholar who has not seriously thought them through. This outward proliferation of 'raised-consciousnesses' among legal scholars can be traced to the results of the deconstructive efforts of legal realists and critical legal theorists and, more recently, to the expressed concerns of feminist legal scholars, ecological scholars, and critical race scholars. And the list of critical perspectives continues to grow.
It is in this context, therefore, that we wish to examine the work of Slavoj Zizek. Drawing heavily upon Jacques Lacan and, to a lesser extent Hegel, Zizek develops a framework within which to analyse political discourse. It is the aim of our thesis, therefore, to elaborate upon this framework with the intention of examining its implications for an analysis of legal and social theory under the gaze of the social movements.

Problematizing the Politics of Transformation: Toward an Ethical Discourse of the Analyst

When we talk of ideological analysis for the purposes of exploring the potential for social transformation, we are directly concerned with human behaviour. All laws are, in one way or another, meant to circumscribe and guide our actions as social agents. Legal and political strategists, therefore, must be doubly aware of the potential multiple effects any one instrument of intervention might have.

Now, in contemplating such strategies, it is also important to consider their means of implementation from an ethical perspective. And here, we might ask what psychoanalysis can offer us in the form of guidance. In contrast to the traditional approach to social change which begins with a fixed idea of the ‘good’ and proceeds to promote the values which accord with it irrespective of the heterogeneity of the social fabric, psychoanalysis favours a response-oriented approach to change.46 This is not only meant to address concerns about the possible effects of specific interventions (for example, the effect on sexual minority groups of banning pornography), but also to query the assumption embedded in the notion of social transformation itself, namely, the motivations driving the desire for change in the first place.
This, of course, brings up the contentious issue of ethics: Who determines what the social symptom is? Who decides what strategy to adopt? Is not implicit in the psychoanalytic approach another version of the ‘good’? The problem with these questions, of course, is that there is no single ‘correct’ answer at this level of abstraction. And even at the concrete level, in taking the response-oriented approach, the answer will depend, to a large extent, on the respondent. Nevertheless, even if we remain at this high altitude of abstraction, we could formulate an ethical stance which, though never completely free of some content, will serve as a kind of regulative ideal. What we have in mind here is the distinction Lacan makes between the discourses of the master and the university on the one hand, and the discourses of the hysteric and the analyst on the other.\textsuperscript{47} The idea is to move away from the notion of social transformation through an imposition of master signifiers onto the subject (either explicitly, as in the master discourse, or implicitly, as in the university discourse) toward an attempt to hystericize the socialized individual in an environment conducive to the production of his or her own master signifiers. This process is referred to as the traversal of the social (or individual) fantasy, i.e., the exposure and highlighting of the contingent nature of socio-historical (or individual-historical) narrative formation; that each historical ‘turning point’ or ‘decision’ is revealed in its Kierkegaardian ‘becoming’, its profound undecidability, and whose radical openness is only \textit{retroactively} converted into necessity, thus effacing the multitude of possible alternative historical trajectories.

In Lacan’s typology, law clearly pertains to the discourses of the university and, to a lesser degree, to the discourse of the master. Indeed, the recent work of J. C. Smith in the field of artificial intelligence concerning the deep structures of specific areas of the law could be construed as remarkably successful attempts at identifying structuring master signifiers within highly specialized legal cultures.\textsuperscript{48} The question, therefore, for legal and political theory from the perspective of psychoanalysis, is to what extent is it
possible or desirable to expect the legal and political discourses (of a predominantly master and/or university ilk) to become hystericized via their analytic relative. Our focus becomes less what the symptom is and more how the 'who' that perceives it is implicated in the very construction of the symptom it wishes to distance itself from. Let us examine this in a little more detail.

Current work on legal ideology is still steeped in a rationalist model of the world, whether in principle or in practice. For those who subscribe to such a world view in principle, the implicit assumption is that once a supposed illusion has been exposed, the individual labouring under the unfortunate veil of false-consciousness will see the error of her/his ways and proceed to lead a more 'genuine' existence. Many theorists, however, are only too aware of the very human trait which pits 'irrational' behaviour against 'rational' knowledge within the same person. Nevertheless, these theorists are at a loss when it comes to strategic intervention with an eye to social transformation. They consider themselves without any other option but to offer alternative ('proper', 'correct', 'better') knowledges with the hope that the veil of behavioural false-consciousness (as opposed to the usual cognitive false-consciousness) will soon be pierced. This is not to say that the concept of false-consciousness is not useful (despite its relatively recent bad press49). Rather, this view, at least at the level of strategic intervention, leaves untheorized, and thus unrefined, at least two types of individuals: those who remain unconvinced of the error of their ways/beliefs (Jews/blacks/gays/lesbians are abnormal and subhuman, people on welfare are lazy bums)50, and those who are convinced and desire to modify their behaviour and yet are unable to do so. And it is worth noting that these observations are not at all of the same order as those made by the law and society scholars, namely of the discrepancy between 'law in the books' and 'law in practice', for this still appeals to a version of traditional false-consciousness. Rather, they refer primarily to the fetishistic split of the Lacanian subject: 'I know very well....(that Jews/homosexuals are just like any other person; that many of my daily activities are a
contributing source to environmental degradation; that I must seek help for my alcohol-related abuse of my wife; that money and property have become my fetishes and manipulate me; that I need to get started on my paper now) nevertheless, I believe (that Jews/homosexuals are corrupters of this world; that the Earth will heal itself; that I do not have an alcohol problem; that I control my money and property; that I can postpone the start of my paper another day). It should be apparent, therefore, that to the extent that progressive scholars are concerned with social transformation, and to the extent that the bulk of the targeted social transformation potential consists in addressing individuals belonging to the two groups described above, traditional logical-rational modes of argumentation will not be sufficient. It is here that Lacanian psychoanalysis has the most to offer. In the instance of the above-mentioned example, the first step in a Lacanian approach involves the recognition of such a fetishistic split as the very definition of the human subject; that it constitutes our very condition humaine; and that we must first undertake to assume it rather than ignore or suppress it. In other words, the split is the source of our symptoms: our symptom is nothing but the external symbolic reaction-formation to an internal antagonism.

We can now begin to appreciate the care and delicacy with which the psychoanalyst must treat an analysand’s symptom. It is the symptom, after all, that constitutes the analysand. We could even say that the symptom is the subject, for the subject is inextricably dependent on it. Perhaps we can also begin to see the significance of the famous Lacanian statement that ‘woman is the symptom of man’. And when we conceive of the Jew as the symptom of the Social, we realize the potential relevance of Lacanian psychoanalysis beyond the realm of the individual. For did we not say that the stake of psychoanalysis is to show that it is applicable to the social field, even if only to define the limits of any kind of social theorizing?
In closing this section, we could perhaps highlight an apparent paradox. In an effort to address the impasse of the individual/community dichotomy, poststructuralists have pointed out that the increasing complexity of life has led to a stupendous proliferation of discourses. Our identity is as fragmented as the number of discourses we traverse, and any semblance of unitary, autonomous subjecthood that may have existed in a less informationally aggressive era has now virtually disappeared. But has it? The hegemonic status of liberal ideology in the political, legal, and economic domains seems to dictate otherwise. The idea that we are rational and autonomous agents fully responsible for our choices and actions still commands respect, and is heavily relied upon, in many academic and professional disciplines. Perhaps more importantly, it still has purchase in the popular imaginary. It is hoped that, by problematizing the subject, psychoanalysis may provide an explanation for this phenomenon and, in doing so, provide a much needed alternative.
A Survey of Psychoanalytic Concepts

**Lacan's Mathemes**

As will become very clear during the course of this discussion, Lacan's mathemes (\(S_1, S_2, a, $\)) will have much to say about the essentialist versus anti-essentialist debate. It will also serve to explain more precisely one of the most significant theoretical concepts, not only in Lacan's theoretical corpus, but also in recent philosophico-theoretical history: the real objet a, a paradoxical object which both escapes and sustains the symbolic order.

We can begin by recalling the essentialist (descriptivist) position wherein intentional meaning precedes the name to which it is attached. Here, a name such as 'chair' or 'table' denotes a set of descriptive and/or functional properties such that any object that satisfies them will be recognized as a 'chair' or 'table'. The theoretical point is that these properties exist independently of the 'christening' process; that they belong to an *a priori* Platonic realm on which their correlative (and imitative) phenomenal embodiments depend for identity. In contrast, the non-essentialist (anti-descriptivist) highlights the retroactively contingent nature of the naming process itself.\(^5^2\) In other words, it is the act of 'baptism' which links together and retroactively constitutes a set of descriptive features as descriptive features (S2) under the 'banner' of a master signifier (S1), such as 'chair' or 'table'.\(^5^3\) From this description, it should be apparent that, in order for a word to be meaningful, we must eradicate from our consciousness all aspects pertaining to the purely phenomenal and leave those which pertain to the symbolic, i.e., the signifiers.\(^5^4\)

We could put it this way: what is obviously true of the proper name (i.e., the contingent nature by which a set of descriptive properties -- colour of eyes and hair,
characteristics such as shyness or responsibleness, talents such as musicianship or athleticism -- is linked to the proper name) is true of any other name. The anti-descriptivist view, therefore, allows for the possibility of a complete replacement of one set of descriptive features (S2) by another, while leaving the signifier under which they are organized (S1) intact. There is, in other words, an irreducible gap between S1 and S2. But what exactly is this 'thing', this 'impossible-real' kernel, this 'surplus', this 'something in it more than itself',\textsuperscript{55} that can survive a complete facelift of its defining properties? In other words, what is it that the master signifier, S1, refers to? It is, of course, none other that the Lacanian objet petit a, the product of the signifying process itself. "[W]e search in vain for it in positive reality because it has no positive consistency -- because it is just an objectification of a void, of a discontinuity opened in reality by the emergence of the signifier." (SO, 95) It is that which remains constant over a period of time when, for example, the defining properties of an element (e.g., 'sodium') completely change from the physical-phenomenal to the chemical-atomic. Or, it is that which remains constant when the 'meter' is defined no longer in terms of a bar of platinum in Paris, but in terms of the speed of light in a vacuum. And, of course, this applies mutatis mutandis at the level of the purely noumenal, as in, for example, 'rights', 'law', etc.

We thus get our first glimpse of its paradoxical nature: while the objet a remains constant as an invariant, it cannot be pinned down to any specific positive property. The paradox is that on the one hand, its presence is real (i.e., defies symbolization), and on the other, its presence can only be detected in reality (the imaginary and symbolic network of meaning). Or alternatively: the signifying process produces the objet petit a which is retroactively posited as its own cause. We have here, in other words, an instance whereby the effect precedes its cause! Thus, we can say (retroactively) that the objet petit a is what the master signifier\textsuperscript{56} aims at in an object (whether phenomenal or noumenal) and is thus its correlative. Thus, what guarantees "the identity of the object in all counterfactual situations -- through a change of all its descriptive features -- is the
retroactive effect of naming itself: it is the name itself, the signifier, which supports the identity of the object." (SO, 94-95)

Under the (Zizekian) antidescriptivist view of things then, what exactly happens when we are asked by someone (who honestly does not know) what a ‘table’ is, or what a ‘chair’ is? Indeed, how should/can we answer? Do we, as true Zizekians, declare that a ‘chair’ is and can only mean... a ‘chair’; that its signification overlaps the very act of enunciation; that it is a ‘signifier without a signified’; that it is, in effect, only an embodiment of a “self-referential, tautological, performative operation” (SO, 99), ie., that it is a piece of the real which is repeatedly referred to and affirmed as ‘chair’ by the intersubjective community (the big Other); that it is disingenuous or dishonest of us to say otherwise? Or do we draw up an appropriate list of positive descriptive features and thus risk propagating the myth that these properties constitute the definitive properties of its essence? Of course, we opt for the latter.57 But why?

The short answer58 is that this deception or illusion is a necessary prerequisite to one’s accession to meaning and constitutes a crucial ingredient of the logic of transference (SO, 102). We are in transference when we think that each of the positive properties or elements offered to describe a chair possess a meaning immanent to themselves. It is only after a necessary retroactive (and unconscious) inversion that meaning is pinned down (SO, 96-97); that the incessant metonymic sliding of the signified under the signifier is arrested. (This explains why Lacan insists that ‘truth arises through misrecognition’). Thus, the cart must always be put before the horse, so to speak. Only later, after careful (deconstructive) detective work, does it become apparent that the list of positive properties (what Lacan designates as S2) serves only to deceive us, ie., to disguise the fact that a ‘chair’ (the master signifier, S1) is only a ‘chair’ to the extent that the big Other guarantees that a particular piece of the real is stigmatized as ‘chair’.59 This ‘error of perspective’ is what Zizek calls ideological anamorphosis,
following Lacan’s own discussion of anamorphosis (FC, 79), especially in the context of Holbein’s painting of the ‘Ambassadors’. (FC, 86) Ideological criticism, therefore, must take the form of identifying and flaunting that meaningless spot or stain (i.e., the pure signifier whose function is purely structural) which gives consistency to the entirety of the ideological edifice. (SO, 99-100)

We should notice, now, how we can already detect some very significant implications of this anti-descriptivist approach for the essentialist-poststructuralist debate, especially in the context of political theory and strategy.

[If the unity of the object is the retroactive effect of naming itself, then naming is not just the pure nominalistic game of attributing an empty name to a preconstituted subject. It is the discursive construction of the object itself. The consequences of this argument for a theory of hegemony or politics are easy to see. If the descriptivist approach were correct, then the meaning of the name and the descriptive features of the objects would be given beforehand, thus discounting the possibility of any discursive hegemonic variation that could open the space for a political construction of social identities. But if the process of naming of objects amounts to the very act of their constitution, then their descriptive features will be fundamentally unstable and open to all kinds of hegemonic rearticulations. The essentially performative character of naming is the precondition for all hegemony and politics. (SO, xiv)]

So, meaning pertains to the order of the symbolic, and is thus dependent on the signifier. The field of knowledge (floating signifiers, S2) is structured by master signifiers (S1). Thus, the master signifier of ‘communism’ will fix the meaning of, for example, ‘freedom’ such that it means ‘effective freedom’ as opposed to ‘formal bourgeois freedom’; or such that ‘state’ signifies the means by which the ruling class guarantees its hegemonic status, etc. And the master signifiers of ‘liberal-democratic’ or ‘conservative’ would, of course, produce different significations. (SO, 102)

And where in all this does the subject as lack ($) figure? Quite simply, it is the space which makes possible the effect of meaning. This is because, as we know from
Saussure, meaning is nothing but the bundle of differences among the signifiers (S2) structured by S1. And the effect of difference can only emerge against the background of a blank space, the $. In other words, the subject as lack is nothing but the place of inscription of the master signifier, S1. This is why Lacan’s definition of the signifier is ‘that which represents the subject for another signifier’; and his definition of the master signifier is ‘that which represents the subject for all other signifiers’. In other words, the transition from the ‘simple’ signifier to the ‘master’ signifier corresponds to, what in Lacanian terminology, is the transition from a feminine ‘non-all’ (open) set to a masculine ‘all’ (closed) set through the process of captionnage, i.e., the emergence of a pure signifier S1, whose real Other is the subject as lack, $.

The a, therefore, is the substanceless object which remains constant and whose consistency is guaranteed by the S1 of the big Other. An object or person’s identity relies on the union of S1 and a, on the fact that a ‘sticks’ to S1; and the consequences of becoming unstuck may be horrifying -- an event which is related to the Lacanian concept of separation. We may get a glimpse of the nature of separation by referring to Neil Jordan’s The Crying Game. This movie’s efficacy is staked upon a scene at about the mid-point of the film in which a person’s (biological/sexual) identity is revealed for what it ‘really’ is. In Lacanian terms, we have a discordance or separation between S1 and a.

The symbolic identity, S1, of ‘woman’ is suddenly detached from the ‘essence’ to which it referred (the objet a). In other words, someone (something) is not who (what) we thought s/he (it) was. The horror experienced by a thoroughly duped heterosexually-identified viewer is portrayed by the protagonist’s reaction (uncomprehending shock and disgust, vomiting, etc.). It embodies the real chasm left open by the temporary absence of the symbolic identity which concealed it. The suffocation persists until the objet a can be gentrified through the attribution of an alternative S1 (eg., ‘transvestite’). We begin to see how the nature of this horror is similar to that experienced by protagonists in science
fiction films in which they are transported from the tranquil past to the foreign and shocking future, or in which they encounter horrifyingly unfamiliar extra-terrestrial life and/or objects. In effect, we have an objet a without an appeasing S1, ie., a foreign object which has not been symbolized and is perceived as a singularity.

The gap between S1 on the one hand, and S2 (which flows through the empty objet petit a) on the other, can also be conceived in terms of a decision (S1) and its justification (S2). The presence of this gap is, of course, acknowledged by the common notion that an opposite decision can always be supported by the same reasons used to justify the original decision. Under this view, the justification is a retroactive effect/product of the decision itself. In the legal context, the strictly circular and tautological nature of the decision-making process is highlighted in cases decided by juries. Here, a decision is made by fellow citizens who have had no prior legal training in matters of evidence or reasoning. It is a process whose function, in effect, is to short-circuit the otherwise circular and never-ending quest for a 'reasonable' or 'fair' outcome.

We can no more set out to arrive at a 'just' outcome in a legal debate by following pre-prescribed rules than set out to fall in love with someone by following a set of instructions. 'I am in love' is a state which always already was. That you are in love with someone only hits you after the fact; after you are already in love. Strictly speaking, therefore, one does not find oneself in the state of 'falling'; rather, one has (or has not) already 'fallen'. And, as far as justification is concerned, one may of course attempt to list the attributes that provided the impetus in arriving at a legal or romantic decision. It would be a mistake, however, to assume that an exhaustive list of such reasons were possible or even desirable. This is why, on the level of common sense, it is perceived as offensive, in answer to the question ‘why do you love me,’ to attempt to enumerate such properties. (TN, 125) At the level of law, the attempt to exhaustively explicate a legal outcome in terms of rules and principles is none other than to succumb to the positivist
temptation. And what exactly do these chains of knowledge (S2) aim at when justifying a particular decision (S1)? The objet petit a, of course.

Thus, the objet a is very paradoxical: it is simultaneously a product of the symbolic process and its cause-resistance. The real is what we try to grasp, but cannot (here we might think of the Nazi attempt to enumerate the characteristics of the Jew so as to scientifically locate the objet a); and the very attempt at grasping it creates the symbolic order. In other words, the impossibility of grasping it is the very condition of the symbolic order's possibility. The idea, then, from a psychoanalytic perspective, is to achieve a certain distance from the big Other, so as not to succumb, as in the Nazi-Jew scenario, to the totalitarian temptation, ie., the temptation to eliminate the objet a which, as will become clearer later, is just an external manifestation of an internal antagonism.

An Ethics of the Real in the Context of Ideological Interpellation

In this account, we also get to glimpse the beginnings of a Lacanian ethic -- an ethics of the real. This ethic is encapsulated in his famous dictum 'don't give way to your desire'. It signals an attempt to briefly suspend the symbolic Other (a kind of Derridean differance), to note the ideological gesture of symbolic interpellation, ie., to recognize that by assuming a symbolic mandate, S1 (eg., 'daughter', 'worker', 'liberal', 'Nazi', etc.), we elude the truth of our subjecthood. Symbolic identification (ie., identification with an S1), however, cannot function as an eluding tactic unless there is a moment of illusion proper to ideology. In other words, "when I recognize myself as the addressee of the call of the ideological big Other (Nation, Democracy, Party, God, and so forth), when this call 'arrives at its destination' in me, I automatically misrecognize that it
is this very act of recognition which *makes me* what I have recognized myself as — I don’t recognize myself in it because I’m its addressee, I become its addressee the moment I recognize myself in it.” (ES, 12) Assuming a symbolic mandate, therefore, entails a certain misrecognition, or untruth. The ideological illusion consists in the presupposition of the existence of the big Other. And his ethics of suspension is what Lacan calls *separation*. In a sense it consists in alienating the alienating agency. We could, perhaps, remark that Peter Gabel’s lamentations concerning the alienating function of the legal discourse ignores the fact that ‘normal’, non-legal existence is also always alienating. In other words, alienation is synonymous with symbolic identification.

In a sense, we could say that we deceive ourselves and others by assuming identifications presented to us by the Other. We act as if they are intrinsic to our being, that they define our essence. And what’s more, there is virtually no escape from this alienation. The only solace we can aspire to, therefore, is to achieve a certain distance from the Other, from the object of desire, to accept the fact that (to use another Lacanianism) the ‘Other does not exist’, to not give way to our desire; to become further alienated through *separation*; to attempt an overlap between our lack ($) and the lack of the big Other ($\Theta$).

Let us now move on to examine, more precisely, the nature of the Lacanian subject and how this leads us to an ethics of the real.
The Subject

In order to glimpse the significant shift introduced by Lacan in the construction of the subject, it is perhaps easiest to start with another conception which is fast achieving hegemonic status: the poststructuralist subject. The current poststructuralist view dispenses with the now vulgar-metaphysical conception of the subject as a unitary, centred, and autonomous agent. At the risk of reducing the many fine variations on the poststructuralist subject-theme, one can attempt a ‘typical’ reading -- one often assumed by Foucauldian and/or Derridean apologists. Here, the subject is conceived as a series of attributes or subject positions which are only temporarily and precariously sutured about a constantly decentred centre, and which always fail to represent the subject accurately. These subject positions are (over)determined by a set of discourses in which the subject participates via imaginary and symbolic identifications (ie., in answering the ideological calls of the imaginary other and the symbolic Other). They can never be exhaustively enumerated, for they cannot be fixed: they are constantly being threatened and subverted by the very openness of the socio-symbolic landscape (ie., the start-stop metonymic sliding of the signified under the signifier). Thus, the subject can never achieve full identity with itself. It is decentred.

Now, to understand the proper dimension of the Lacanian subject we can begin from this state of a successfully subjectivized individual. In a bid to subjectify, we must now remove each of these subject positions one by one until none remain. The empty form we are left with, the lack, the abyss, is the subject. In this view, therefore, the subject emerges when there is a failure of identification. Hence, Lacan’s denotation of the subject as a crossed-out fullness, $$.  

We can see, then, how it is the very process/structure of subjectivation (ie., assumption of subject positions) that masks the true nature of the subject, namely the lack
which remains once the substantive predicates have all been withdrawn. As Zizek explains:

Our predominant idea of the subject is, in Lacanian terms, that of the 'subject of the signified', the active agent, the bearer of some significations who is trying to express himself in language. Lacan's starting point is, of course, that symbolic representation always distorts the subject, that it is always a displacement, a failure — that the subject cannot find a signifier which would be 'his own', that he is always saying too little or too much: in short, something other than what he wanted or intended to say.... To put it paradoxically: the subject of the signifier is a retroactive effect of the failure of its own representation; that is why the failure of representation is the only way to represent it adequately. [Thus,] we have a kind of dialogic economy: we articulate a proposition defining the subject, our attempt fails, we experience the absolute contradiction, the extreme negative relationship between the subject and the predicate — and this absolute discordance is the subject as absolute negativity. (SO, 175) "In other words, all my positive consistency is a kind of 'reaction-formation' to a certain traumatic, antagonistic kernel: if I lose this 'impossible' point of reference, my very identity dissolves." (SO, 176)

We can see now the significance of Zizek's critique of Althusser. The emphasis of Althusser was on the process of identification and not its object-cause. In other words, Althusser's account omits the significance of interpellation as a mechanism by which the subject's abyss is veiled.

And it is worth noting that, to use psychoanalytic terminology, the hysteric is the one who has bared naked the abyssal nature of his or her subjecthood. The failure of interpellation is betrayed by the question 'why me?' i.e., of someone who simultaneously questions the symbolic mandate foisted upon her/him, and desires to be pacified by covering up his/her lack. A recent exemplification of the hysterical subject is the young Jerry Conlan figure in Jim Sheridan's _In the Name of the Father_. We have, here, a clear depiction of the failure of the interpellation process, i.e., the failed attempt by the State to define this victim of contingency (his mere presence in the vicinity of the pub explosion is sufficient) as an 'IRA terrorist'. In effect, the question that Conlan constantly asks is 'Why me?'65
This is why hystericalization is the aim of analytic discourse. It is an attempt to bring the analysand into a position from which he or she may realize the contingency of the assumption of a symbolic mandate, and thus of a particular fantasy. The analysand can then hope to achieve a certain distance from his or her own fantasy so that it becomes more flexible. And we can immediately see the importance of this if we accept that we relate to one another only insofar as the other takes up a position in one's fantasy. This is why Lacan never tires of repeating that 'there is no sexual relationship': in the heterosexual instance, man can relate to woman only insofar as she embodies the objet a in his fantasy ($\geq a$). In this way, we might say that relationship 'problems' are a function of fantasy rigidity. And this, of course, can have potentially tragic consequences, as when a woman refuses to act out the male fantasy-ritual of clitorectomy.

To return to our discussion of the subject proper, we could say that there clearly appears a difference between the Derridean and Lacanian subjects. Zizek describes this difference: "With Derrida, as with Lacan, the identity of the subject -- the process leading to it (identification, interpellation, 'recognizing oneself as subject') -- is always truncated, failed, the subject's condition of possibility is simultaneously the condition of its impossibility." "With Lacan, however, it is not enough to say that the subject's identity is always, constitutively, truncated, dispersed because of the intrusion of an irreducible outside. The point is rather that the 'subject' is nothing but the name for this 'mutilation', for this impossibility of the 'substance' to realize itself fully, to achieve its full identity-with-itself." "[T]he subject is the negative of the strange body which prevents substance from achieving identity with itself." Thus, the passage from Derrida to Lacan can be articulated by the "inversion of 'mutilated subject' into 'subject qua mutilation'." (EP, 95) "It is in this sense that the enigmatic Lacanian phrase defining the subject as an 'answer of the Real' is to be understood: we can inscribe, encircle the void
place of the subject through the failure of his symbolization, because the subject is nothing but the failure point of the process of his symbolic representation.” (SO, 173)

It is worth noting that the priority given by Lacan to the signifier should not be seen as an eclipse of the subject (as is the case in the structuralist world-view), but rather as an attempt to highlight the subject’s very heavy dependence on it. In this sense, we can say that language lives through us, not the other way around. The subject can only be retroactively posited as an effect of the symbolic order’s inconsistency. If the symbolic order were to achieve full identity with itself, there would be no subject.

Another way to look at the Derrida-Lacan relationship is to say that Lacan takes Derrida more seriously than Derrida himself. Lacan acknowledges the debt to Derrida’s close readings (of, for example, Husserl, Saussure, Levi-Strauss, Rousseau, Condillac, Freud, etc). They demonstrate, with utmost rigour, the commonsense awareness of how meaning can never achieve full closure; how something always escapes or prevents its self-identity; how one never says exactly what one means and never means exactly what one says; how what one says is always already subverted by its dangerous supplement. Indeed, it is in this sense that one can say that his work is always a variation on the same theme. But Lacan does not stop there. Rather, he takes this as his starting point. (SO, 175) It is in this context that the function of the objet petit a becomes apparent. It represents an attempt by Lacan to formalize the impossibility of closure. We can clarify this further by referring again to the antagonistic relation.

The paradigmatic antagonistic relation is, of course, the Hegelian Lord and Bondsman. Here, the relation is seen to be composed of two subject positions. But the important thing to realize is that the relation is asymmetrical: the Bondsman cannot achieve full identity with himself; he is marked by a certain failure or blockage; and it is this blockage which becomes externally projected onto the Lord, such that the Lord is perceived as a foreign element which prevents the Bondsman from achieving self-
identity. In other words, the Lord is the external manifestation of the internal blockage of the Bondsman. It is in this sense that we can say that the relation is one of extimacy, where the prefix ‘ex’ denotes something external to one’s intimate being.

This analysis also applies to the case of the Social vis-a-vis the Jew. We can see that the drive to homogenize the political field (as in Rawls), though well-meaning, can be dangerous. This phenomenon of the constitution of the Social by the alienation, if not elimination, of an Other can be clearly observed in the breakdown of communism in Eastern Europe and Russia. It explains the irruption of enjoyment (ie., jouissance) in the form of anti-semitism, nationalism, and religious fundamentalism -- a development that has come as a shock to many pundits who thought pluralist democracy was an inevitability. It is not. Why? Because the disintegration of an enemy means that a new one must be found for the purposes of consolidating one’s identity. (And, today, the usual targets are immigrants.)

We can see now that the totalitarian temptation consists in the Social misperceiving this Outside as foreign to itself, as menacing, and thus in need of elimination. The psychoanalytic stake consists in creating an environment in which the extimate nature of the relation can be apprehended. In Mouffe’s terms, the aim is to convert the pathological antagonism into a simple neurotic agonism.

The Lord and Bondsman template can be used to explain a variety of behaviours. Take the issue of handing in to an instructor one’s paper assignment. Initially, the deadline lies on the horizon, just out of view; and, for many, this translates into a process whereby many interesting and inventive practices are born in a bid to sustain a procrastinating habit. As the deadline approaches, its imminence being directly proportional to the workspace, one realizes that even a frenzied attempt at the last moment will not be sufficient to produce a satisfactory result. The deadline, therefore, is viewed as an impediment or obstacle to the ‘perfect’ paper, the successful product. In short, the
deadline prevents us from reaching our desired ego ideal (pertaining to the symbolic order) or ideal ego (pertaining to the imaginary order); it prevents us from achieving full identity with ourselves. In other words, the fantasy involves the possibility of full closure but for the deadline and, in this manner, it structures our desire. The lesson to learn from the Lord and Bondsman scenario, of course, is that this impediment is nothing but an external projection of an internal blockage. And this is why, for those (procrastination-prone) individuals, the most subversive strategy (from the instructor's perspective) is to unhesitatingly grant an extension. The idea is that the student will come to realize his or her impossible relationship to the deadline such that it is no longer so intensely reified as an external obstacle.

This analysis applies also to the opposition language/external reality. The idea here is that language can only become a totality, a closed volume, against an 'external reality'. In the absence of an 'external reality' or an equivalent master signifier, we are left with an open and ceaseless circularity. Witness the feeling of 'chasing one's tail' in attempting to pin down the meaning of a word through the characteristically never-ending cross-referencing of a dictionary. What must be grasped is that this 'external reality' is nothing but the external manifestation of the internal antagonism of the linguistic medium itself. Missing this point leads to a reification-fetishization of 'external reality', involving the futile attempt to grasp it independently of language. Finally, and by no means exhaustively, we could mention how the Lord and Bondsman paradigm also addresses the issue of empathy and communication. Here, we might observe that empathy and communication between individuals and between cultures is possible not because of any common values, but rather because of a common blockage, a common lack. (TN, 31) It is this lack which is the engine of language.

We can see now the problem with advocating such warm fuzzy things as dialogic intersubjectivity (Hutchinson), or a Habermasian communicative ideal, or a Rawlsian
homogeneous public, political field devoid of conflict. The moralizing strategies which preach non-violent relations with others need to be radicalized such that the Other is seen to be a positivization of the lack at the centre of our being. In other words, it is our position that there is a striking difference between conceiving full subjecthood as possible and conceiving it as impossible. In viewing the antagonistic Other as a projection of our own self blockage, the totalitarian temptation can be assuaged into a more manageable agonism. In other words, we must make a shift from a perception of the Other as external to the Other as an external projection of an internal self-impediment.

**Ethics Revisited: Traversing the Fantasy**

What this account suggests, therefore, is the significance of language and culture inasmuch as they provide us with the material signifiers with which to structure our desires (ie., fantasize) and cover the lack of both ourselves and the big Other. Derrida repeatedly shows us how we can never achieve full identity with ourselves, that we never say what we mean to say, that we always say too much or not enough, that every statement that we make is always subverted by a dangerous supplement. Lacan’s ontological version of the subject as lack provides us with a first draft of an explanation. It also implies an ethic -- an ethic which mocks the essentialists’ attempt to pin down the forever elusive objet petit a by attempting to list all the defining characteristics of, for example, a person or an object. It means that we must come to accept the split which defines us as humans, and to avoid perceiving external objects as the cause of our inability to achieve a ‘higher state of consciousness’. On the social level, it also serves to deflect the totalitarian temptation whereby Society’s internal antagonistic split is
Chapter One: Setting the Stage for a Lacanian Displacement

projected onto an external object (the Jew, for example) that embodies the obstacle to its full identity, and must therefore be eliminated.

It would be reasonably accurate to regard Lacan's later work as an attempt to focus and further theorize upon that 'little piece of the real' which escapes the signification process: the objet petit a. Let us now attempt to more precisely delineate its relation to fantasy; and we shall do this by a detour through the hysterical subject.

As we have seen, it is through imaginary and symbolic identifications that a subject becomes "integrated into a given socio-symbolic field" (SO, 110); that she adopts certain socio-symbolic mandates. The important thing to notice is that this mechanism by which the individual is (retroactively) interpellated into subject is not as smooth and clean-cut as it seems: there is always a gap or leftover that serves to unsettle the subject. This unsettling effect is strongest and most manifest in the hysterical subject who, faced with the big Other's edict to assume a symbolic mandate ('you are my master, my wife, my king'), must ask the big Other 'Che Vuoi?' (E, 312), a question whose variations can be partially listed as "'You're telling me that, but what do you want with it, what are you aiming at?'," (FC, 214; SO, 111) 'what do you really want?', 'why am I what I'm supposed to be, why have I this mandate?', 'why am I...a teacher, a master, a king...?", "what is it in me that makes me the...wife, the king?" (LA, 131) Briefly: 'Why am I what you [the big Other] are saying that I am?' (SO, 113). Che Vuoi? aims to discover what the desire of the big Other is (in the subjective genitive sense, i.e., what is the big Other's desire?). "The hysterical question opens the gap of what is 'in the subject more than the subject', of the object in subject which resists interpellation -- subordination of the subject, its inclusion in the symbolic network." (SO, 113)71

And what is the answer to che vuoi? It is, of course, fantasy. It is what constitutes the subject's attempt at answering this question, albeit unconsciously; of dealing with the surplus (the little piece of the real) that escapes the signification process.
“If the Name-of-the-Father functions as the agency of interpellation, of symbolic identification, the mother’s desire, with its fathomless ‘Che vuoi?’, marks a certain limit at which every interpellation necessarily fails.”72 (SO, 121) The most troubling aspect of this desire of the Other is that the question betrays a certain want, a certain lack. This is what Lacan calls the lack of the Other, S(Ø).

It is this lack that gives rise to Che Vuoi?, and it is the function of fantasy (Øa)73 to conceal the Other’s void. In the case of anti-Semitism, for example, “the answer to ‘What does the Jew want?’ is a fantasy of ‘Jewish conspiracy’: a mysterious power of Jews to manipulate events, to pull the strings behind the scenes.” (SO, 114)

The crucial point that must be made here on a theoretical level is that fantasy functions as a construction, as an imaginary scenario filling out the void, the opening of the desire of the Other: by giving us a definite answer to the question ‘What does the Other want’, it enables us to evade the unbearable deadlock in which the Other wants something from us, but we are at the same time incapable of translating this desire of the Other into a positive interpellation, into a mandate with which to identify. (SO, 114-115)

We can understand, therefore, why the psychoanalytic ethical encounter calls for a traversal of fantasy: to show how the fantasy conceals a nothing, the Other’s lack which is also our own.74
Relevance to the Critique of Ideology

Here, it is worth quoting generously as Zizek outlines, and argues for, a two step process to ideological critique. The important point to grasp is that a Lacanian-informed critique of ideology has as its target not so much the realm of imaginary and symbolic identifications. It does not concern itself so much with interpellation per se. Rather, it aims more at the real register which escapes the process of signification, i.e., the dimension beyond interpellation. Referring to Lacan's graph of desire, we could say that such a critique places itself firmly within the upper level rather than the lower level, the latter of which serves as the primary arena for the fast-becoming norm of poststructural discursive analysis.

[The impossible 'square of the circle' of symbolic and/or imaginary identification never results in the absence of any remainder; there is always a leftover which opens the space for desire and makes the Other (the symbolic order) inconsistent, with fantasy as an attempt to overcome, to conceal this inconsistency, this gap in the Other. And now we can finally return to the problematics of ideology: the crucial weakness of hitherto 'post-structuralist' essays in the theory of ideology descending from the Althusserian theory of interpellation was to limit themselves to the lower level, to the lower level of Lacan's graph of desire -- to aim at grasping the efficiency of an ideology exclusively through the mechanisms of imaginary and symbolic identification. The dimension 'beyond interpellation' which was thus left out has nothing to do with some kind of irreducible dispersion and plurality of the signifying process -- with the fact that the metonymic sliding always subverts every fixation of meaning, every 'quilting' of the floating signifiers (as it would appear in a poststructuralist perspective). 'Beyond interpellation' is the square of desire, fantasy, lack in the Other and drive pulsating around some unbearable surplus-enjoyment.

...[Thus, there are] two complementary procedures of the 'criticism of ideology':

-one is discursive, the 'symptomal reading' of the ideological text bringing about the 'deconstruction' of the spontaneous experience of its meaning -- that is, demonstrating how a given ideological field is a result of a montage of heterogeneous 'floating signifiers', of their totalization through the intervention of certain 'nodal points' [i.e., tracing how a certain category, such as 'woman' or 'Jew' is constructed (overdetermined) by the operation of a range of different discourses];
-the other aims at extracting the kernel of enjoyment, at articulating the way in which -- beyond the field of meaning but at the same time internal to it -- an ideology implies, manipulates, produces a pre-ideological enjoyment structured in fantasy. ["As such, fantasy is not to be interpreted, only ‘traversed’: all we have to do is experience how there is nothing ‘behind’ it, and how fantasy masks precisely this ‘nothing’. (But there is a lot behind a symptom, a whole network of symbolic overdetermination, which is why the symptom involves its interpretation.)\] (SO, 126)\] (SO, 124-125)\]

We can see, therefore, how a Lacanian psychoanalytic theory brings an insightful contribution to the debate on ideology through the concept of fantasy. This contribution could also be conceived in terms of the fetishistic split between knowledge and action, ie., between our internal antagonism and its external symptomatic projection.

Here, the debate can be formulated in terms of the following question: ‘On what side does ideological illusion lie -- on the side of knowledge, or on the side of action (ie., the doing)?’ (SO, 30-31) As Zizek points out, Marx (and most current theorists) places it on the side of knowledge. Thus, his standard definition of ideology (in his \textit{Capital}\footnote{Zizek, however, disagrees. This is because ideological illusion can be found on the side of action.}) as false consciousness follows the pattern ‘they don’t know what they are doing, but they are doing it anyway’. (SO, 28) Now, if we could only disabuse ourselves of this knowledge-illusion, (ie., become aware of the true nature of things: that money and property are the expression of social relations, not fetishistic ‘objects-in-themselves’), we would indeed not be disillusioned. It is in this context that Zizek suggests that we should view Peter Sloterdijk’s contribution to the debate. In his \textit{Critique of Cynical Reason},\footnote{This is because ideological illusion \textit{can }be found on the side of action.} he argues that Marx’s ‘false-consciousness’ pattern of behaviour has been superseded by the ‘cynical’ pattern of behaviour: ‘they do know what they are doing, but they are doing it anyway’. (SO, 29). Thus, in conceiving ideological illusion on the side of knowledge, we can legitimately say that we are living in a ‘post-ideological’ world. Zizek, however, disagrees. This is because ideological illusion \textit{can} be found on the side of action.
What post-ideological cynics "overlook, what they misrecognize, is not the reality, their real social activity. They know very well how things really are, but still they are doing it as if they did not know. The illusion is therefore double: it consists in overlooking the illusion which is structuring our real, effective relationship to reality. And this overlooked, unconscious illusion is what may be called ideological fantasy." In other words, the proper and "fundamental level of ideology... is not of an illusion [on the side of knowledge] masking the real state of things but that of an (unconscious) fantasy structuring our social reality itself"... Cynical distance is just one way -- one of many ways -- to blind ourselves to the structuring power of ideological fantasy: even if we do not take things seriously, even if we keep an ironical distance, we are still doing them." (SO, 32-33) The trap the cynic falls into could also be articulated in terms of Lacan’s big Other. He recognizes full well that the ‘big Other does not exist’. What he ignores, however, is the efficacy of the big Other despite its inexistence. He underestimates, in other words, the real consequences stemming from subjects-supposed-to-believe. (SO, 185-186)

This, of course, is just a replay of the distinction between the lower and upper levels of Lacan’s graph of desire. Placing ideology solely on the side of knowledge is equivalent to restricting ideological critique to symptomal, deconstructive, and interpretive readings (ie., the lower level of the graph corresponding to the universe of meaning). Opening up the side of activity to ideological analysis provides the key to isolating the fantasy and its correlative, the sinthome, that structure reality itself, ie., the very ground from which our actions spring (ie., the upper level of the graph corresponding to jouissance, the source of the big Other’s inconsistency).
The foregoing discussion centering on some of Lacan's basic concepts, including their implications for the critique of ideology, will serve as a backdrop for a more detailed elaboration upon his potential contribution to legal theory in the context of a transformative politics.
Specifying the Lacanian Contribution to Legal Theory in the Context of a Transformative Politics

In considering more precisely the specific contribution of a Lacanian approach to legal and political theory, it is perhaps helpful to begin by problematizing the status of theory itself. For theory does not belong to a realm separated from the events of our everyday lives (at least for those who seriously subscribe to it). Rather, it represents a world view through which we apprehend the trivialities and vagaries with which we are constantly confronted.

Like any discursive formation, theories are identified by the unique signifier patterns that congregate about specific issues (i.e., the specific attempts through symbolization to grasp the real). Thus, issues concerning decision-making processes, interpretive constraint, and the rights discourse will be framed differently (and will therefore give rise to different assessments) depending on the legal theory invoked: natural law, positivism, law and economics, materialist marxism, poststructuralist postmarxism, etc.

We can get some idea, therefore, of the specific nature of a Lacanian contribution to contemporary legal theory by looking at the manner in which it modifies current approaches to these issues. It is in this sense that we advocate a Lacanian displacement, a displacement whose causal nexus is the subject and its failed attempts at identification. We have already suggested why we think our thesis goes beyond the traditional psychoanalytic forays into law. It is now incumbent on us to show, in more detail, why we think Lacan can offer something unique to today’s theoretical debates in legal academia, especially from the progressive standpoint. And we could abbreviate his contribution with two words: subject and ethics.
The Subject of Ethics

One could argue that there is no political or legal theory that does not rely, either explicitly or implicitly, on a particular epistemology/ontology and on a particular view of subjectivity or agency. And since one of the foundational and most powerful pillars of psychoanalysis is its theory of subjectivity, it will undoubtedly prove critical in any endeavour first, to launch a Lacanian critique of existing political and legal theories, and second, to establish the contours of a revised theory.

Psychoanalysis dispenses completely with any notion of an essential, unitary, and rational agent who is fully conscious of his or her thoughts and actions. But so, also, does it eschew the poststructural agent which is as fragmented as (or which is effaced by being reduced to) the number of discourses it traverses. Now, current legal theoreticians subscribe to one or more of the versions of the subject so readily dismissed by Lacan. We might ask, therefore, what remains. And the answer is, of course, nothing; or, more precisely, a void. As we have already seen, the Lacanian subject, like the democratic subject (according to Claude Lefort), is the subject as lack: $.

This (re)definitional move may, at first sight, seem trivial, even offensively so. But we shall see that it harbours the potential to significantly alter the theoretical landscape. In a first approach, we could point out how we are forced to reconceive the psychoanalytic process of identification — a process which currently serves as the main focus of many poststructuralist legal academics. Acts of imaginary and symbolic identification are seen not so much as mechanisms of identity consolidation, but more as so many ways of evading the true lack of subjecthood. And can we not, here, detect the intimations of an ethics?

We should remark that the above allusion to an ‘evasion’ should not be taken to downplay efforts made by minorities and the oppressed to create new identities. On the
contrary, reconceiving the subject as lack means that identity formation is an inevitable and crucial part of one’s psychic development. More importantly, it highlights the social character of the individual. It shows us that the subject is radically empty and at the mercy of the big Other (the symbolic order). Its lack is the object-cause of its desire, causing it to turn outward and assume a symbolic mandate (eg., ‘mother’, ‘son’, ‘lesbian’, etc.). But while it is necessary to attend to the issue of how certain identities (eg., ‘woman’, ‘gay’, etc.) intersect with the symbolic order in general, Lacan suggests we look more closely at what propels the process of identification: the subject as lack and its desire to fill it.

One of the key poststructural contributions to theory concerns the nature of identity: symbolic identity is differential; it is sustained by the bundle of its differences from other signifiers in the symbolic order. Often, it is consolidated by its opposition to another subject position which condenses a series of meanings. Thus, we very rapidly come to recognize many such mutually supportive identities: Nazi/Jew, Patriarch/Feminist, Industrialist/Environmentalist, etc.

To understand more precisely what psychoanalysis adds to this poststructuralist common sense, we could compare their respective strategic responses. And here the ethical colours begin to show. Some poststructuralists advocate a non-violent relationship to the Other as part of their strategy. Others advocate a proliferation of identities so as to diffuse the starkness of the oppositions. Now, the danger with such programmatic approaches is that they can often come across as strikingly moralistic and self-righteous. It suggests that some subject positions are good and some are not so good; that I am right and you are wrong; thou shalt love thy neighbour. These approaches correspond to the master (and university) discourses in which master signifiers are imposed upon the subjects. And, of course, this only highlights the difficulties faced by educational institutions (at both the secondary and post-secondary levels) which attempt
to introduce self-declared ‘progressive’ courses to address issues of poverty, racism, sexism, etc.

The irony in many such poststructural strategies resides in the fact that their form looks remarkably modernist. Indeed many, such as Gayatri Chakravorty Spivak, have openly assumed such a paradoxical stance by retaining the full poststructural rigour at the level of analysis but adopting the attitude of ‘strategic essentialism’ at the level of planning. Even so, as we have just seen, this approach seems to make little change in terms of one’s world view and practice. One could even say that things are made harder because the historicist’s systematic reduction of practically everything to discourse, including the subject, means that we are left with precious little with which to garner support or to attach hope.

Lacan, on the other hand, elevates historicity at the expense of historicism. Not everything can be relativized for the real order resists all modes of symbolization. And it is in this sense that the subject, emptied of all content, belongs to the real dimension. It exists as a meaningless stain, a point of singularity which defies gentrification. What must not be missed, from the Lacanian perspective, is what makes possible the creation of the antagonism: the subject opens up the space into which its antagonistic subject position slips. In psychoanalytic jargon, this translates as the projection of our own internal blockage onto an external Other which embodies the objet petit a, and which therefore constitutes the correlative of the subject as lack. In other words, the Jew is no longer seen as external but rather as extimate and contingent.

It is now a short step to recognize the ethics implied in the preceding paragraph. Such an ethics of the real calls for a full assumption of our lack; to recognize in the antagonistic Other the materialization of our own self-blockage; that your relationship to the Other is an externalization of one’s self-relationship. We see, therefore, how precisely this ethical attitude can be articulated. As soon as we succumb to the temptation of filling in our lack so as to conceal it, we give in to our desire, and we fall
for the totalitarian temptation. The idea is not to avoid identification, but to avoid it as a means of avoiding our lack. This ethics, therefore, is formulated negatively (as was done by Freud) as a call to resist the lure, to maintain a separation between the symbolic identification and the lack which it veils. And we could add here that the traversal of fantasy consists in nothing but the staging of this absence; that the fantasy invoked in response to the ‘che vuoi?’ is nothing but the attempt to conceal the inconsistency of the Other.

The relevance to legal theory should now be apparent. From a theoretical perspective we see how it adds a crucial element to the study of law whose unit of analysis is the social relation; and also how it may cause us to reconsider both the attitude and manner in which we go about considering issues of social transformation. It is no longer sufficient to say that a social relation must be examined in terms of its multidimensionality; to describe how the dimensions of which it is comprised interact with the legal dimension. Neither, however, is it sufficient to break down a social relation into its component subject positions and demonstrate how each is discursively overdetermined; to show how each defines itself only through its opposition from the other. One can no longer rely on a model which subscribes to a traditional conception of false-consciousness which purports to modify behaviour by demonstrating the illusion that we are labouring under; to simply show how things could be otherwise; to historically contextualize a social relation; in short, to engage in symptomal-deconstructive readings whose premise is that more (but differently organized) information will effect progressive change, and whose result is often a kind of fetishization of knowledge.

However, this is not meant to dismiss the critical significance of such hard work. On the contrary, they constitute an indispensable first step to tackling the issues which our thesis (in concert with the new social movements) is most concerned to address: how to transform destructive antagonistic sites into less pathological agonistic sites.
Symptomal readings are crucial because they are an important source of floating signifiers; they constitute indispensable elements for a kind of Hegelian 'weaving of the spirit'. In other words, they are a means by which the surface lying at the bottom of a tradition is disturbed -- a surface whose thusly unsettled and disengaged signifiers come to embrace a newly discovered free-floating state. And it is from this pool of floating signifiers that new meanings emerge; that new jouissances are circumscribed.

But if we take seriously the insights of Lacan, we find that though such symptomal readings are a necessary prerequisite to social transformation, they are not sufficient. Indeed, strictly speaking, neither is the much touted psychoanalytic traversal of fantasy -- the process by which we come to see not only that 'things could have been otherwise', but that our identifications and imagined scenarios conceal nothing, a lack, a void in ourselves and in the Other. Rather, the stake of psychoanalysis is to create the circumstances in which the analysand can come to identify with the sinthome; to realize that the form of the symptom betrays her real jouissance; to recognize in the antagonistic relation to the Other (the symptom) the truth about herself; to fully assume, rather than evade or cynically alienate, the fetishistic split that defines our very condition humaine.

We can now better understand Lacan's ethical stance toward the social transformative project. And perhaps we could also consider it against the background of the current dilemma that faces many critical legal theorists, especially feminist legal scholars. What we have in mind here is, of course, the nauseous 'pulling of the carpet' effect caused (through the invocation of a whole array of deconstructive techniques) by our confrontation of the radically contingent nature of social construction. If everything is political, if my opinion is as good as yours, if values are always relative, how can we justify our appeals to a 'better' norm, to a more 'equitable' standard?

At the outset, we should note that appeals to a 'better' explanation or narrative need not be seen as negating the plurality of perspectives. Indeed, one could say that
such appeals rely on it. For such a view queries the rigid and essentialist temptation to define, for example, what 'really' constitutes woman. In its place we find a more fluid category, whose character is always determined by the particularity of context. Fantasy, in other words, is always characterized by specificity of signifier constellations. It resists universalization. The implication, of course, is that incompatibility between fantasies is inevitable, that hegemonic interpretive battles are a natural, and even welcomed, outcome. Such an approach dispenses with ideas which subscribe to the notion that oppression can and should be eradicated once and for all, for such projects entail giving way to the totalitarian temptation of defining in advance all possible substantive evils. Rather, the poststructural psychoanalytic strategy advocates that we deal with each case one by one, and by resisting the temptation to uniformly and arbitrarily apply the rules. And the practical relevance of such observations to environments comprising dispute resolution processes, including those conducted in a court of law, should be obvious. Thus, an 'ethical' feminist approach translates into an attitude in which

[t]he specificity of individual discourses is always respected, the norms of one never imposed on the study of another. In terms of [the] feminist project, this means that... it attempts to determine, through analysis, the specific concept of woman that each discourse constructs and the specific actions it directs toward her. The oppressive notion of 'woman's oppression' thus vanishes and is replaced by detailed descriptions of the practices that bring a particular category of woman into being, exclude her, make her visible, invisible, valuable, redundant, dangerous, etc. Vanished, too, is the dream of a total revolution that would deliver woman's freedom. Dreaming is replaced by intervening -- one by one -- in practices that can only limit power, never totally deny it.81

But these reconsiderations, which have been prompted by the barrage of critiques launched from within the feminist movement, and which are becoming more and more commonplace in virtually all critical legal movements, still remain firmly within the poststructural problematic. And while such reformulations are important, they, like symptomatic readings and fantasy-traversals, are not sufficiently up to the transformative
task. This is because the emphasis is more on the hegemonic and hermeneutic struggles rather than the object-cause of such identity competitions, namely the subject as lack.

The benefit, from the perspective of progressive scholars, should not be hard to discern. In a way, we could say that by defining the subject as real, as dehiscent, the deck is stacked in their favour. Why? Well, because it offers us something constant; something which repeatedly defies all our attempts to gentrify it; something which persistently resists all modes of symbolization; something that has the property of invariance, much like Einstein's theory of relativity exhibits the property of invariance from one spatiotemporal frame to another. In other words, it attempts to overcome the impasse confronting theorists whose models appear to be stuck between two horns: the appeal to the notion of shared values and the notion of a conflict of values. Lacan suggests we dispense with the pre-Kantian idea of a substantive subject and replaces it with the substanceless point of pure apperception, the Cartesian subject in all its abstraction. By regarding the subject as a wound desiring to be healed we have, at last, another basis of commonality: the lack.

In a way, this is similar to Rorty's call to solidarity through shared pain. But not quite for, as Zizek points out, Rorty still associates pain with the breakdown of specific imaginary and symbolic identifications. (LA, 158) So, he ends up with just another variation on the value theme. He misses the real dimension which such identifications attempt to appease, and the possibility of expanding the purview of empathy is thereby lost. In other words, the ability to empathize is still attached to the idea that we must share some common experience, some common symbolic or imaginary identity. And is this not one of the central arguments in support of policies of positive discrimination? That white heterosexual middle class males just do not have the experience to justify genuine empathy with women, with gays, with people of colour, with a welfare recipient?

As we have already hinted, the Lacanian approach locates the source of this lack of empathy at the radical level of the real. In this sense, therefore, it has very little to do
with the standard, but valid, counterargument which suggests that, strictly speaking, no experience can ever be identical -- an argument which is responsible, for example, for the ongoing minority-propelled phenomenon of feminist movement multi-furcation. Indeed, it goes in the opposite direction: it expands the empathizing group. And what's more, it explains the otherwise anomalous situation in which a white heterosexual middle class male can and does genuinely empathize and fight for a seemingly unrelated-to-him progressive cause.

This is because Lacanian empathy lies on the level of the real. The subject as lack implies a desire to fill that lack, and that is the condition that we can empathize with. We each have our own very personal history; our unique narrative; our specific trajectory of experiences; our own historically contingent series of imaginary and symbolic identifications. But the real lack is the rock that stands firm, the immutable wound that defines us.

Empathy can also be conceived in terms of one's respect for another's fantasy. We have just seen how each subject's fantasy is uniquely defined. We can attempt, therefore, an alternative reading of Lacan's ethical dictum 'do not cede your desire'. This would involve recognizing that the contingent nature of one's own fantasy construction is just one of many ways that our lack can be appeased. We then achieve a certain distance from our fantasy without compromising its crucial role in structuring our lives. We perform a kind of simulated self-immolation such that our fantasy becomes less rigid. And its only in achieving a certain distance from our own fantasy that we can come to empathize with another subject; that we can come to regard another subject's fantasy with reverence. (LA, 156-157)

Now, it is true that the idea of the subject as lack can come across as being unduly depressing and tragic. What remains, therefore, is for us to transform this reaction-observation into a positive theoretical proposition. Do we have to remind ourselves of how disasters and tragedies have a remarkable bonding effect? Is this not related to the
intuition that led Rorty to suggest pain as the foundation for solidarity? So, by heeding our earlier critique of Rorty, all we need do is locate this ‘disaster’, this dehiscence, on the register of the real. In this view, the subject is always already marked by tragedy. And it is this tragic mark that can serve as the only legitimate common denominator among human beings, not some appeal to shared (or conflicting) values -- an appeal which operates at the levels of the imaginary and symbolic. Perhaps we can better understand now our earlier statement which made synonymous the redefinition of the subject with the progressive new social movement ethos. Paradoxical as it may sound, the substanceless subject has real clout, a peculiar clout which possesses a vector that can ethically orient our lives.

The Function of Law: Justice or Appeasement?

The ethics of resisting the lure is, of course, applicable to the legal decision-making process. The lure is comprised of the rules and the institutional and personal biases that frame the issue. We could say that a properly ethical or just decision corresponds to the Lacanian act, the paradoxical manner in which one both follows the Law (the big Other) and suspends it. It marks a impossibly sharp point of pure undecidability by which the final link which tethers us to the Other is severed. And it is here that Derrida comes closest to the dimension of the real. For, in discussing his notion of justice as aporia, he describes its constitutive paradox, the hallmark of jouissance:

[F]or a decision to be just and responsible, it must, in its proper moment if there is one, be both regulated and without regulation: it must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case, rejustify it, at least reinvent it in the reaffirmation and the new and free confirmation of its principle.
And, of course, this moment of pure singularity corresponds to the subject as lack which always already was in the past and never is in the present. It is what installs a gap in the substance which can only be retroactively inferred from a structural inconsistency. We could say that the process of legal decision-making, strictly speaking, corresponds to the psychoanalytic process whereby the hysteric is appeased. For the hysterical subject is one whose lack has become exposed and who desperately seeks to be filled. Hence, his search for a master, for someone who will attempt to cover up the real wound with master signifiers.

And can we not see here what Zizek has in mind when he talks of the appeasing nature of law? The anxiety we feel in making or awaiting a decision relates not to the distance that separates us from some long lost (Mother-) object with which we seek to merge. Rather, it signals our overproximity to loss itself -- an overproximity which tempts us to seek a master by engaging in either the discourse of the master or the discourse of the university. And Law is just such a discourse. From the perspective of scholars who concern themselves with social change in the context of law, the appeasing function of law should not be underestimated. Appeasement corresponds to alienation in the big Other, and its effect is felt from the very moment a (hysterical) subject seeks the services of a lawyer. And this pacifying effect does not derive simply from the knowledge that a wrong may be righted, or that one's interests will be represented, or that justice will be done. Rather, the appeasing effect resides in the very act of transforming one's status from subject to individual; the act of transcribing one's complaint into the formal language field of the big Other. In other words, legal pacification has little to do with the pleasure principle which relates to incentives and rewards. It has to do with distancing oneself from the suddenly very proximate nature of one's empty objet petit a. We conclude with Miller's account of this feeling:
But there is something more in this shaping of the complaint. While your lawyer filters, posits and formalizes your complaint, you realize that somewhere you are satisfied. In the process of formalization itself, even though nothing has been done to mend your displeasure, which is always there, and causes the whole affair, in some place you are happy, happy because your displeasure has been formalized. Your are happy I may say, despite having infringed the pleasure principle. Therefore you grasp maybe how the shaping of the message, even its legalese ciphering, produces a *jouissance*, or more accurately an extracted *plus-de-jour*, drawn out from displeasure itself through this formalization.\textsuperscript{85}

**On Authority**

In returning very briefly to the question of justice in the legal decision-making process, we could perhaps broach the issues of legitimacy and authority. (We have already touched on the issue of justification (S2) as it relates to the decision (S1) in our section on Lacan's mathemes.) Of course, by doing so, we are launching ourselves into the very traditional debate on the nature of law: what 'is' law? But we will not even attempt a survey of existing theories of law and how they account for obedience. Rather, the aim of the present exercise is to offer us a glimpse of the way Lacan presents us with an alternative way of conceiving the binding effect of law. In particular, it shows us how his conceptual apparatus, especially as it relates to the real order in general, and the *objet petit a* in particular, has an uncanny affinity for paradox. And this peculiar predisposition can assist us in better apprehending paradoxes and inconsistencies. In this sense, we could say that we experience the appeasing effect of Lacan's own big Other, ie., his theoretical panoply. And the relevance of this conceptual apparatus is, of course, not limited to law, nor to specific subdiscourses of law.

Here, for example, we could use our discussion on legal obedience as an excuse to address the (traditionally) vexing question: is international law 'really' law? We begin
by noting that the question whether international law is law is phrased in a manner that suggests that it can be answered only after one has arrived at a particular conception of law itself. If, for example, law is conceived primarily in terms of enforcement (i.e., in terms of orders backed by realizable threats, whether physical or economic), as John Austin argues, we may get one answer. If, alternatively, law is conceived primarily in terms of criteria of legitimacy and validity (as in a contract bargaining process whose resultant treaties could be said to have an international jurisdiction) such that secondary rules of recognition can be discerned with an eye to settling conflicts between primary rules of application, as Hart argues, we may get another answer. And so on.

What the poststructuralist tells us is that lurking behind the term ‘really’ in our question is the essentialist temptation so clearly succumbed to by those belonging to the schools of Natural law (whether in terms of God or Reason) and Positivism (whether in terms of rules or state actors). Such foundationalists subscribe to something inherent, inevitable, and unchangeable in the nature of law. What a Zizekian approach highlights is the affinity of the question ‘what is law?’ with the equally confounding question, ‘what is (transferential) love?’ In both cases we are dealing with the psychoanalytic phenomenon of transference; and insofar as law is bound up with the concept of transferential authority, it may prove helpful to examine this in more detail.

Following Kierkegaard, Zizek specifies the foundation of authority: “the ultimate and only support of a statement of authority is its own act of enunciation.” (ES, 94) More specifically, it tells us that authority which is founded upon punitive threats is not, strictly speaking, authority (i.e., symbolic authority), but rather an “agency of brute force: authority proper is at its most radical level always powerless, it is a certain ‘call’ which ‘cannot effectively force us into anything’, and yet, by a kind of inner compulsion, we feel obliged to follow it unconditionally.” (ES, 94) This is why authority has a paradoxical flavour to it. On the one hand, we respond to the call of a statement not because of its contents, but because of the authority vested in the enunciator; and on the
other hand, we only accept such authority on the condition that the messenger is made transparent to the message. So where, then, does authority lie? The answer, of course, is in the objet petit a: the empty set constituted by the intersection of the messenger’s personal characteristics (his institutional links, for instance) and the message’s content. It constitutes the object-cause of desire whose void is filled in by fantasy. To conclude, therefore: International law is law insofar as we accept that it has something in it more than itself: the objet petit a of authority.

On the Materialist/Poststructuralist Opposition

So far we have discussed issues relating to the topics of the subject and ethics from a Lacanian perspective, and we are now moving on to consider the nature of language and its relationship to non-linguistic entities. We will therefore examine in more detail Lacan’s stance in regard to the epistemological and ontological debate as it relates, for example, to the materialism/discourse opposition.

But before going on to talk about the specific contribution that psychoanalysis makes in reconceiving this dichotomy, it is perhaps worth reminding ourselves of the traditional debate, with the poststructuralists on one side, and the materialists on the other. The materialist critique of the poststructuralist position points to an undue emphasis on language-games at the expense of concrete power relations. The message of materialists can be conveyed anecdotally: ‘enough of empty words, lets get down to some serious action’. Such calls are common. Indeed, we could risk the generalization that the frequency of such accusations has risen in the wake of the ‘politics of experience’ movement. This is why they command sufficient respect and empathy to often not require detailed justification. This is not to say that such criticisms are always
unwarranted. Indeed, it sometimes seems that poststructuralists are oblivious to the power of the words they themselves use; or underestimate the rhetorical force of appeals to an ‘external reality’. But what many try to point out is that the proliferation of glib dismissals may harbour the danger of missing the significant poststructural contribution. In other words, at the level of empty criticism, the poststructuralist could just as easily retort that power relations themselves obfuscate the materiality of the signifier. It is, poststructuralists insist, the material nature of court-room language-games which result in very real effects (or, to invert the above anecdotal gibe, as Zizek does, ‘enough of empty acts, let’s get down to some serious word-games’). This is why Lacan, in his poststructuralist guise, often referred to books as kilograms of signifiers: to emphasize their *materiality*: Power relations are themselves an effect of the structure of the signifier. In other words they must be seen as abbreviations of specific signifier constellations.

For purposes of clarity, we have portrayed the debate as highly polarized. Of course, many who engage in this debate find themselves at different points along the spectrum -- a spectrum whose extremes can be characterized by those who, on the one hand, wish to establish non-linguistic materiality as the social determinant of the ‘last instant’; and those who, on the other hand, wish to establish discourse as the social determinant of the ‘last instant’. And the relevance to the contemporary debate on the rights discourse should be readily apparent. Are rights determined by a *material* or *discursive* matrix? Do these two extremes not also share a homologous affinity with the polar opposites in the traditional dichotomies of content/form or substance/process?

Perhaps we should now consider how Lacan contributes to the debate. At first sight, it may seem that his linguistic forays betray him as a die-hard poststructuralist. Is it not the case that he adds nothing which could rupture the circular nature of our entrapment; that he does not assist us in achieving some distance from the entrancing effect of the harmonic system -- a system defined by the theoretical pendulum that swings
from one extreme to the other? Our position, of course, compels us to answer in the negative; that Lacan does indeed introduce a crucial displacement whose effect is to transform the hypnotizingly repetitive circle into a more productive spiral. We could even say that Lacan’s own theoretical trajectory outlines this spiral. From his early imaginary-substantive phase, he moved onto his symbolic-structural phase and finally came full ‘spiral’ to his real-paradoxical phase. Lacan’s displacement could also be conceived in terms of the Mobius strip: if we progress far enough on the side of discourse, we end up on the side of ‘external reality’. Or, if we progress far enough on the side of form, we end up on the side of content. He suggests that everything cannot be reduced to discourse; but, at the same time, the real which escapes discourse does not have an a priori status which serves to constrain it. Hence its paradoxical status: the real dimension is both presupposed (jouissance) and posed (objet petit a) by the symbolic order.

In order to more fully appreciate this displacement, we could expose the presupposition that unites the two extreme positions as outlined above. And that is the highly deterministic (in the case of the materialist) or overdeterministic (in the case of the poststructuralist) nature by which the social is conditioned. In other words, they both subscribe to a theoretical model of the universe which is linear and causal, even if the complete network of causes and effects cannot be mapped out in practice. Lacan makes his mark by installing a gap in the causal chain, a gap which is subsequently effaced, and which is responsible for our intuitive sense of free-will and contingency which is always retroactively converted into (over)deterministic necessity. And this gap, which also accounts for the linguist’s version of psychoanalytic castration, is nothing other than the Lacanian subject; the singularity which cannot be tamed by the symbolic order; the ‘missing link’ which pertains to the real order and which never ‘is’ but can only ever be ‘was’ or ‘will have been’.
The paradox, of course, is that though the real order resists and escapes the symbolic and imaginary orders, it constitutes their only support. Signifiers congregate around, and attempt to gentrify, real disruptions of the symbolic surface. These raw pockets of jouissance, then, are what provide the 'sticky' substance that accounts for the structural order of the big Other. It presents us with an answer to the question (hypothetically) posed by the materialist and addressed to the poststructuralist: if it is indeed true that, due to the radical indeterminacy and openness of our discursive medium, 'anything can happen', including the establishment of a more equitable and just society, why is it that 'anything' (a just society) does not actually come to pass?

Here, we might comment on the uncanny parallel between psychoanalytic theory and the theory of complex adaptive systems. At the level of the component units (signifiers) and their rules of interaction (metaphor and metonymy), we have an almost infinite range of possibilities -- a state of potential anarchy. Yet, once we move from the microscopic to the macroscopic, we find that there is an unmistakable order, which at that level, seems to justify the appeal to such notions as predictability and probability. We are referring, of course, to the phenomenon of emergent behaviour, a theoretically sound and experimentally-verified occurrence which applies to a wide spectrum of activities found in biological systems (as in the theory of evolution), physical systems (as in the transition from the quantum level to the macroscopic level), economic systems, etc.

Now we should, perhaps, pause to consider the reason Lacan is often misconstrued as a (traditional) poststructuralist. What we need to realize is that the real psychoanalytic substance (jouissance) that sustains the symbolic order can be accessed only through the signer. It is only through a close study of discursive patterns of repetition, inconsistencies, etc., that the discursive structure's interstitial glue can be grasped. Thus, his prioritization of the signifier, and the symbolic order in general, is in
recognition of the fact that, for instance, a particular signifier constellation is what betrays the presence of jouissance. It is the signifier pattern that points to an object’s subliminal or, alternatively, disgusting status. (This is also related to Lacan’s concept of separation.) The line between them is a lot finer than we would suspect and is strictly dependent on the object’s location in the particular culture’s symbolic universe. In other words, how an object gets caught in the symbolic web will determine its status as either a sublime (Freudian) Thing, or a disgusting protuberance. And its status is always precarious. The transition from one to the other is what Lacan referred to in his *Four Fundamental Concepts of Psychoanalysis* (FC) as the operation of changing the ‘precious gift’ into a ‘gift of shit’. Here, we might think of the ancient Chinese practice of foot binding, or the tribal practice of adorning women with a series of ring necklaces so as to physically extend the neck. Perhaps this indicates to us, as Zizek notes, another form of ideological critique, namely of adopting toward one’s own belief structure a foreign gaze -- an attitude whose effect would be to subvert the usual tendency in which cultural differences are often taken to indicate the superiority of one over the other rather than the contingency of each.

In an effort to further expose the inextricable link between the real and symbolic orders, we may recall our explication of the role of the objet petit a in countering the descriptivist’s epistemological-ontological view. Was that not a clear example of how such a real substanceless object is both presupposed and produced by the symbolic order? Could we not say that it pushes the discursive-poststructuralist/material structuralist debate beyond the symbolic/imaginary opposition and into the paradoxical realm characterized by an inessentially essential (or essentially inessential) object?

So how can we re-phrase and re-grasp the Lacanian contribution to the debate? We could simply say that the discourse/materiality split falls within discourse itself. The symbolic order (language, culture), just like the Laclau and Mouffean Social, is traversed
Chapter One: Setting the Stage for a Lacanian Displacement

by real antagonisms; and the imaginary order is responsible for reifying the projection of this internal real impediment as an external Other.

A final alternative in conceiving the move beyond the poststructuralist/materialist snare is to realize how each position subscribes to a teleological model of the world. In Lacanian terms, they both misunderstand the male 'all' logic, a logic that even Derrida misses, according to Zizek, when he criticizes Lacan's famous conclusion that 'the letter always arrives at its destination' (ES, 12). In a style homologous to the illusory process of interpellation, each assumes that the addressee ('external reality' in the case of the materialist, 'signifier' in the case of the poststructuralist) precedes the ideological call. Thus, Lacan problematizes this teleological presupposition and offers us a real alternative: the paradoxical and retroactively contingent creation of a cause.

On Superegoic Repression and the Desire of Rights

How else can we conceive of the Lacanian contribution to legal theory? We could highlight how he offers us a standpoint from which to critique Foucault's concept of law in a way which makes it relevant from the point of view of scholars interested in social transformation. As we have noted elsewhere, law for Lacan is associated with the big Other. Now, Foucault went to great lengths to point out that the law (and other disciplinary apparatuses), despite its prima facie prohibitory guise, functions to present or produce the object of desire. In Lacanian terminology, when the split subject looks outward for an object to fill its void, the law (as big Other) provides a means to satisfy that desire. Foucault repeatedly emphasized the productive function of disciplines (discourses of sexuality produce sex) and dismissed a more negative or repressive
function -- an observation which constituted the foundation of his attacks on psychoanalysis.

In taking up this last point, it should be noted that, though his insistence on the productive aspect of regulation did much to change the traditional approach to discourse analysis in which the regulatory object was somehow defined in advance and independently of the discursive process, Foucault also managed to misrepresent the psychoanalytic notion of repression by confusing its two incarnations and by missing the subtlety of the notion he intended to criticize.90 The first version of repression refers to primal repression, i.e., the negation which both founds and splits the subject. It signals the subject's accession to the symbolic order through the expulsion of the real, making communication possible and laws intelligible. We come now to the second version of repression, the one that Foucault takes aim at in his tirade against psychoanalysis. The primal negation, having made laws conceivable, opens up the possibility of viewing law as either productive or repressive. And in one sense, psychoanalysis (by which we mean both Freudian and Lacanian) would affirm its productive aspect. It is productive, as already mentioned, because it creates a desire targeted at the object being prohibited. But what usually gets missed (most notably by Foucault), is the fact that desire also folds in on itself so that what is produced is not only a desire for the forbidden object, but also a desire not to desire the forbidden object. The psychoanalytic name for the agency presiding over this latter desire is the superego, and it accounts for the feeling of guilt we experience after an act of transgression -- a phenomenon which is unaccounted for using the Foucauldian conceptual framework. It is in this sense that law is seen as repressive (from the psychoanalytic perspective) in the second mode of negation.

We can see, therefore, the relevance of the dialectic of desire to strategies that aim to effect behavioural modification through legal means. And perhaps we can briefly remark on the relevance of Lacan's concept of desire to the discourse of rights.
We will not here engage in the traditional debate raging in the critical legal studies literature concerning the progressive potential of the rights discourse. In that debate traditional marxists argue that the form of rights is too strongly imbued with the dominant and individualistic form (of the capitalist mode of production) to serve as a useful tool in bringing about meaningful change. Taking their cue from current poststructuralist theories of language and action, post-marxists dismiss the attempt to link rights to material economic conditions 'in the last instance' as a profoundly foundationalist gesture. They argue that marxists underestimate the function of discourse. In this view, the transformation of rights into a progressive instrument is made plausible by creating new alternative equivalential links.

While acknowledging the importance of such a discussion from the perspective of a transformative politics in general, our purpose is only to hint at a possible alternative approach to the issue. Here we will have recourse to Lacan's theory of the dialectic of desire.

Marx's well known critique of the abstract nature of rights focuses on its ideological function, ie., the operation by which underlying inequalities are concealed. As already mentioned, many CLS scholars further push the point home by arguing that rights serve only to propagate the capitalist form of relation. Claude Lefort, however, though acknowledging the need to be clear about the material conditions within which the discourse of rights operates, argues very strongly for their retention. He agrees that there is a danger due to the possibility of conflating two separate ideas: 'everyone *is* equal' and 'everyone *should be* equal'. (And it is the job of academics and social critics to keep these two notions separate.) Nevertheless, the danger attached to the absence of rights as empty universals would be far greater. Rights are, he insists, indispensable to our modern notion of democracy because they serve as the empty space from which a critique of existing social relations is made possible in the first place. It is the appeal to a universal which is responsible for the split between power and legitimacy.
In other words, it is from the point of pure lack (absence of contents such as race, sex, age, etc.) that a critique of differential treatment becomes possible. The stake of the democratic project is to keep this place, the democratic subject (homologous to the Lacanian subject), empty. As soon as we attempt to define the subject by enumerating or codifying its subject positions, we fall into the totalitarian trap. It is in this sense that we can say that it is undesirable to exhaustively present all our rights. A Lacanian caveat in implementing the discourse of rights for progressive purposes, therefore, would be that it might give us the impression that we have found our object(s) of desire: all we have to do is describe them and transcribe them into legal form so that our society may at last be free of conflict. This would constitute a fantasy in need of traversal.

Lacan as a Poststructuralist: Strategies, Power Relations, and Structural Constraint

What is clear from a Lacanian approach to legal theory, is the relevance and importance of the function of the signifier in concealing a lack or impediment. The significance of discursive (symptomal) analysis stems from the fact that it is the sole means with which we may isolate the real jouissance (as in, for example, the Laclau and Mouffean social antagonism) which structures (and is produced by) the symbolic order (ie., the discursive formation). Discourses must be scrutinized for those coupling signifiers (woman, gay, proletarian) responsible for interdiscursive connectivity and for the transmitted equivalential logics. Ideological and psychoanalytic investigation must then attempt to map out the social psyche in terms of the master signifiers that structure it. In the broadest of terms, this is done by identifying patterns of repetition and
inconsistency in and around the discourses and issues under investigation. In short, psychoanalytic legal analysis is nothing but a version of cultural analysis.

What must be brought home is the fact that a psychoanalytic investigation concerns itself not so much with the 'material' facts as they 'actually' are or happen. Rather, it emphasizes the importance of how such facts are perceived and how they interact with a person’s or society’s symbolic order. Psychoanalysis is thus a social science of signifiers, not of hard facts existing in some 'external reality'. Poststructuralist psychoanalysts, such as Lacan, are often accused of denying the reality of such things as physical pain and psychic anguish; of not taking seriously the plight of marginalized groups by reducing everything to language games. Such analysis, critics charge, ignores the truth of political dynamics and power relations.

Of course, it would be silly to assert that we cannot feel something when we stub our toe unless we can label that experience with an appropriate signifier. What Lacan attempts to point out, however, is that what is important from the perspective of social analysis is how that phenomenal sensation is localized by the symbolic order. There is simply nothing to be gained in engaging in a debate about whether something 'really' exists 'out there'. In other words, what is important are the signifiers that constitute our symbolic universes because it is they that cathect and circumscribe our jouissances. This does not mean that the notion of 'external reality' does not serve an important function. It does. It serves as an external reference through which language transforms itself from an open-ended 'non-all' order to a closed 'all' order. And to seek to establish this 'external reality' as it 'really is' without the contaminating effects of language-mediation is to engage in the metaphysical quest for an ultimate truth. Thus, critics who dismiss poststructural psychoanalysis for the reason that it reduces objects and relations to signifiers miss the psychoanalytic mark. From the strategic point of view, one is not interested in correspondence theories per se. Rather, one is interested in how
representations themselves are formulated through signifier chains, and how those chains link up with other chains in a way which serves to appease our lack.\textsuperscript{93}

**Power Relations**

This brings us nicely to the topic of power relations. The usual materialist critique is merely a replay of the language/external reality opposition. Surely, the critics exclaim, poststructuralists' emphasis on language ignores the very real power relations that imprint any given social milieu. Here again, the poststructuralist could again point out that an emphasis on power relations is not analytically helpful when it comes to strategizing. This is not to say that talking in terms of power relations, or of physical and formal (political, legal, etc.) structures are not useful \textit{per se}; that they cannot serve as useful concepts in explaining how a range of ideas or outcomes can be confined to a certain range of possibilities. Rather, from the poststructural point of view the danger is the possible and frequent elision exhibited by the passage from an object's or relation's characteristics to an object or relational essentialism. In other words the signifiers become fixed to an external reality, and the opportunity for formulating alternative equivalental logics is missed. Explanations which rely heavily on concepts such as 'power relations' and 'structural constraints' should, in this view, be taken not as 'things-in-themselves', but rather as abbreviations of specific signifier constellations. Here, we will not take up the topic of power relations in detail, for we shall discuss them more thoroughly in later chapters. We will only mention that Laclau and Mouffe's typology of relations (in terms of subordination, domination, and antagonisms) reveal an insightful link between the traditional poststructural approach to power relations and what might be conceived as a Lacanian poststructural approach to power relations.
Structural Constraint

How can we make structural constraint relevant to law? In a first approach, we could cite examples of structural constraint which occur in the domain of law, for example, the time for legal argument, rules for admission of evidence (e.g., native narrative histories, sexual assault admissibility rules), rules regarding intervening arguments. But, we could also tie the issue of structural constraint to interdiscursive connectivity. Law can be conceived as a site of political transformation, a site of ideological confluence, or as itself a source of ideologies. For present purposes, we could perhaps use the idea of scripts to describe law. We have a set of rule-like scripts whose variables are combined in a specific fashion and whose outcomes can have physical and distributional consequences ranging from the minimal to the extreme. These might include voting or citizenship eligibility, incarceration, damages, or medical and other benefits for couples. Thus, the legal process involves the transcription of facts into legally recognizable (client-favourable) phraseology. In tort law, for example, facts may be used to bolster one or more factors going to the standard of care tests of what a reasonable person ought to have foreseen, or of what a reasonable person ought to have done once armed with that foresight. The importance of legal definitions and scripts can be readily seen in the case of marital rape. Until recently, and in many jurisdictions yet, the legal concepts of ‘married couple’ and ‘rape’ were considered incompatible or mutually exclusive to the point of not recognizing the category of ‘marital rape’. The impact on women in traditionally conceived couples is not too hard to imagine. The impact on individuals as members of same-sex couples is more complicated, but real nevertheless.

We can now attempt to address more directly the issue of structural constraint. We could say, perhaps, that the constraint of scripts (rules, interpretations, judgments, etc.) is a function of repetition; that to the extent that a specific behaviour (act or
statement) is repeated, the system with which such behaviour is affiliated is marked by a certain rigidity. And to the extent that such repetition is normalized, as in the judicial practice of precedent, we have 'legislated' constraint (and thus legitimation). In other words, legal principles can be said to constrain to the degree that there is a clear dividing line between permissible and impermissible signifier links. This explains, for example, the crucial importance of setting up the facts even before legal argument begins. It also explains the difficulty with which new equivalential links may be introduced, such as between 'person' and 'woman'/‘person of colour’; or between ‘couple’ and ‘gay’/‘lesbian’; or between ‘family’ and ‘homosexuality’; or, in the context of religious institutions, between ‘priest’ and ‘woman’/‘gay’; or, in the context of political institutions, between ‘rights’ and ‘relationality’/‘state intervention’.

It is clear, therefore, that the supreme ideological gesture invoked by the concept of 'constraint' (and its 'henchconcepts' of precedent or citation) involves its performative force — a force which gives it an air of inevitability. As is the case with any interpellative act, we assume a symbolic mandate not because we recognize ourselves in the call but because our very act of recognition retroactively posits a symbolic mandate to be assumed. In the context of the disciplines of sexuality, Judith Butler, invokes Derrida’s concept of citation, to make a similar point: “[I]f a subject comes to be through a subjection to the norms of sex, can we read that 'assumption' as precisely a modality of this kind of citationality? In other words, the norm of sex takes hold to the extent that it is ‘cited’ as such a norm, but it also derives its power through the citations it compels.” From a strategic point of view, therefore, we may wonder how we might produce a kind of Derridean iteration, ie., how we might introduce a slight displacement in the citational practice so as to effect a more pronounced disruption of an intended closure. At the intersection of law and sexuality, Butler inserts the following question: “What would it mean to ‘cite’ the law to produce it differently, to ‘cite’ the law in order to reiterate and
coopt its power, to expose the heterosexual matrix and to displace the effect of necessity?"95

Consideration of such a project should not be taken as a simplistic affront to notions of predictability and legitimation, and a corresponding apotheosis of uncertainty and wild abandon. Rather, it should be taken to problematize practices whose legitimate existence depends heavily on repetition and convention. Such strategies are meant to create the space for new mental maneuvers and to give confidence in exploring new modes of thinking. The Lacanian conception of the subject gives us a powerful explanatory model which accounts for strong institutional resistance to change. It tells us that such traditionally rigid symbolic orders as those of the Church and Law are a possible (but not inevitable) consequence of the subject’s and society’s split. Institutional opposition to new ideas is related to the anxiety experienced when we come too close to the objet petit a, i.e., when we begin to sense the utter contingency and meaninglessness of our existence, and that things could just as well have been otherwise.

The above examination of the concepts of ‘power relations’ and ‘structural constraint’ are not, of course, meant to solve difficult issues, to provide ready-made answers to troubling questions. Rather, they are meant to permit a reconceptualization of the terrain on which debates take place. So, when a progressive lawyer is fighting a custody battle on behalf of a lesbian mother, the question remains: does one risk entrenching the status quo by arguing on the basis of (and hence citing/legitimating) the ‘accepted’ factor in determining the best interests of the child, namely, that the child will grow up straight? Or, does one attempt to insert a displacement in the well-worn tracks of this legal doctrine and thus risk complete derailment? The answer is that strategy will, as always, depend on such factors as the client’s disposition, the specific judge hearing the case, and so on.96 The point, however, from a Lacanian perspective, is to understand the mechanics of identification and the function of law in appeasing society’s dehiscence.
It helps us recognize that, though practices usually do constrain, they need not do so. On the one hand, it keeps us on our toes such that we may grasp an opportunity for change when it arises (as opposed to resign ourselves to 'fate' and 'inevitability'). And on the other hand, it jolts us from complacency; in other words, it shows us how signifying practices can have profound effects on people caught in its cracks and folds.
Conclusion

The purpose of this chapter was to serve as an introduction to some basic Lacanian ideas, especially those pertaining to a new ethics of subjecthood; and to briefly consider their potential value in reconceiving legal theory in the context of a transformative politics. It is acknowledged that some legal concepts were dealt with in less detail than others, and that some concepts were not even mentioned. However, we intend to deepen our psychoanalytic sensibility vis-a-vis legal and political theory in the following chapters.

The idea was to introduce a new perspective so as to reformulate current theoretical impasses and paradoxes. In a way the aim was to introduce new floating signifiers so as to facilitate a disruption of well-worn thought patterns and create an opportunity for new meanings, new connections, creative capitonnages. As such, the message that psychoanalysis has to offer is that a progressive strategy would be more effective if its energy were directed less at attempting to control specific content and more at attempting to foster an attitude of deferral or Derridean differance. In other words, good intentions and the promotion of 'better values' are no longer sufficient for progressive change. That is not to say, however, that content is of no concern. It certainly has a very important role to play in fostering this attitude of reflective deferral; and equal and fair access is an important issue to resolve in the context of an increasingly information-based society. Nevertheless, there is an important ethical shift to be made away from simply countering certain values with other values, toward a response-oriented approach in which certain values are questioned/subverted without aggressive substitution.97

To conclude, we reiterate that the object of our thesis is to begin to rethink and rearticulate traditional problems and concepts (both from a theoretical and strategic-
practical perspective\textsuperscript{98}) through a Lacanian lens. The important message we wish to convey is the danger inherent in any approach which subscribes to the belief that it is possible to achieve a (politico-legal) totality devoid of (ant)agonism, whether on the level of the social or on the level of the individual. In this respect and in following Chantal Mouffe, it is perhaps worth remembering the etymology of the word 'politics': polis (which evokes the idea of commonality, as in the subject as lack), and polemos (which evokes the idea of (ant)agonism and hegemonic struggle).
Notes to Chapter One


5 The remedy, however, is not to be viewed as a panacea, of making things ‘fine and dandy’; but rather more in the style of ‘the wound is healed only by the spear that smote you’. (TN, 165) It entails recognizing that, though language is responsible for the subject’s split (in the same sense that society is split), it is also our only source of consolation.

6 Here, we might mark the confluence of social and physical sciences from the perspective of complexity (anti-chaos) theory. The homologous nature of psychoanalysis and complexity is easy to spot. Psychoanalytic social theory deals with well defined units (signifiers) which interact in a manner which can be described using a set of rules: metaphor and metonymy. It is the interaction of large numbers of such units in accordance with certain rules that gives rise to the phenomenon of structured, or ordered, emergence (a counterintuitive, but in the end reconcilable, notion when viewed against the background of the second law of thermodynamics). Complexity theory has been used to explain such patterned behaviour as that of a flock of birds negotiating an obstacle in their line of flight or the emergence of mind from a network of neurons. The question is: to what extent can such ideas be transferred to the social domain. The idea seems to be at least plausible given the recent efforts at the Santa Fe Institute (the hub of complexity theory) to build computer software specifically with social and political theorists/strategists in mind.

The general idea is that one need not predict outcomes with exact specificity; that one can learn a great deal from patterns and forms, as in the study of weather patterns in meteorology. Thus, notions of strange attractors and the Lacanian objet petit a could be conceived as mathemes which permit an investigation into the limits of theory. But in what sense can we say that the science of complexity alters our usual conception of science? Here, we could, perhaps, refer to Darwin’s theory of evolution.

We could say that, beginning with specific starting states and rules of interrelation, anti-chaos theory shows us that, for complex adaptive systems, the space of possible steady-state solutions/final outcomes is, in contrast to standard linear systems, drastically reduced. This is why the standard Darwinian model must be revised. For example, starting with 200,000 bulbs (or genes), each connected to any two others with a random relational rule, we end up with around 320 final states in a very short period of time. (This is remarkably close to the approximately 250 types of cells in the human body: liver, kidney, heart, etc.) According to Darwin’s theory, we would need a time period of the order of the universe in order to pass through the entire space of possibilities (subjecting each to the principle of natural selection) forecast by simple linear combinatorial or permutational configurations. A modified version of his theory, therefore, would retain the principle of natural selection, but it would be seen to act on a significantly reduced set of possible final states. It is worth noting again that the specific characteristics of the long-term final states cannot be predicted in their particularity. Investigating the limits of theory would, of course, involve questioning more precisely the nature of such predictions and their implicit boundaries.

7 This difference in emphasis is not at all meant to present the two approaches as mutually exclusive. Indeed, we will argue, toward the end of this chapter, that there is room for a Lacanian poststructuralism. Rather, it is meant to foster a conception of psychoanalytic theory as an almost inevitable consequence of a more engaging examination of concepts within postmodernism/poststructuralism itself. This difference in emphasis can be seen, first, in poststructuralism’s preoccupation with the idea that meaning is always overdetermined or intertextual, that what one says always either is in excess or falls short of what one intends to say, that what one means to say is always subverted by a negative supplement; whereas psychoanalysis is more concerned with the process by which the slippage of the signified under the signifier is halted (through the process of capitonnage). Second, poststructuralism often works with the assumption that the juxtaposition of intended meaning with its exposed negative supplement is sufficient for the effect of subversion to take place. In other words, there is an implicit subscription to a rationalist model of the world. Psychoanalysis problematizes this. Third, psychoanalysis exposes the somewhat
Chapter One: Setting the Stage for a Lacanian Displacement

'safe' poststructuralist position that 'there is no metalanguage' as itself a metaphysical symptom. Rather than take 'there is no metalanguage' to mean that there is no pure transparent object language (ie., a third medium through which an 'external reality' can be apprehended without distortion), psychoanalysis prefers the maxim to be interpreted as indicating that there is nothing but object language — specifically, the language of the objet petit a. (SO, 158) Fourth, poststructuralism construes the subject as a collection of subject positions, whereas psychoanalysis construes it as a lack.


4It is in this sense that psychoanalysts can be viewed as information, or social, engineers. This view also provides us with a hint as to why the issue of ethics figures prominently in his theoretical expositions. It could be construed as analogous to the ethical considerations that arise in the case of genetic engineering.

5The big Other refers to the symbolic order which operates in the register of language-culture (signifiers) and is often embodied in (though can never be reduced to) an authority figure (eg., God, father/mother, etc.) or institution (eg., the Church, Law, etc.), or even a collection of individuals representing a community.

6This, of course, implies an alternative ethics. More specifically, it implies an ethics of the real, a topic which we will be examining in more detail later.


13Ibid. at 371.

14As has been pointed out by J.-A. Miller, the replacement does not come about without a certain remainder: the real (superegoic) father who incites us to jouissance. And, of course, the tripartite classification of the father has a homologous affinity with the triad need-demand-desire.


18Ibid. at 1503.

19Ibid. at 1519, quoting Schafran, 'Gender and Justice: Florida and the Nation' (1990) 42 Fl. L. Rev. 181 at 186 and n.18.


22Sheleff, supra at 148.

23Ibid. at 148.

24Ibid. at 149, quoting Frank, Jerome, Law and the Modern Mind, supra at 116.


Any statement of authority has no other guarantee than its very enunciation, and it is pointless for it to seek it in another signifier, which could not appear outside the locus in any way. Which is what I mean when I say that no metalanguage can be spoken, or, more aphoristically, that there is no Other of the Other. And when the Legislator (he who claims to lay down the Law) presents himself to fill the gap, he does so as an impostor. But there is nothing false about the Law itself, or about him who assumes its authority. (E, 310-311)

See, for example, his statement that "[w]hile one may accuse Lacan of reducing everything to language, the notion of language is at the same time expanded to include, or become, structure itself": Caudill, 'Lacan's Law and Ours', supra at 427. In other words, according to Caudill, everything is coextensive with structure. He thus ignores the critical dimension of the real order's jouissance which both escapes and sustains that structure.

Known invariably as the master signifier, point de capiton, or pure signifier. It denotes the signifiers which structure our symbolic universes (the big Other, the symbolic order).

This signifies denotes the chains of knowledge that are structured by the master signifiers.

The split subject; the subject as lack.

The Lacanian objet petit a, the surplus jouissance, or plus-de-jouir (named after Marx's surplus value).


A brief description of Lacan's discourse types appears in chapter two.

This is probably because of the intimation of 'superiority' and its correlative 'derogation' in the prefix 'false'. Catherine MacKinnon and Andrea Dworkin have been the most viciously criticized for their use of the term in the context of feminist legal discourse and comparative cultural studies. However, the more benevolent (naive?) user of the term generally intends the word more in the sense of retrospective enlightenment or even moral relativism.

This category would also include those individuals who may not feel happy about their actions, but being subject to a 'higher' principle, must nevertheless continue to act the way they do.

This is meant on a level akin to the present teachings in theoretical physics among whose most startling contributions since the turn of the century is the Heisenberg Uncertainty Principle. Thus, for example, the velocity and position of an electron cannot simultaneously be known in principle. In other words, on the strictest level of analysis, certainty is unattainable. We are left with only possibilities and probabilities -- an irreducible undecidability.
"The radical contingency of naming implies an irreducible gap between the [Lacanian] real and modes of its symbolization: a certain historical constellation can be symbolized in different ways; the real itself contains no necessary mode of its symbolization." (SO, 97)

It is because the real itself offers no support for a direct symbolization of it — because every symbolization is in the last resort contingent — that the only way the experience of a given historic reality can achieve its unity is through the agency of a signifier, through reference to a 'pure' signifier. It is not the real object which guarantees as the point of reference the unity and identity of a certain ideological experience — on the contrary, it is the reference to a 'pure' signifier which gives unity and identity to our experience of historical reality itself. Historical reality is of course always symbolized; the way we experience it is always mediated through different modes of symbolization: all Lacan adds to this phenomenological common wisdom is the fact that the unity of a given 'experience of meaning', itself the horizon of an ideological field of meaning, is supported by some 'pure', meaningless 'signifier without the signified'. (SO, 97)

As Zizek notes, this is identical to the Derridean process by which elements are constantly marked and re-marked, whether in the realm of drawing (figure and ground), music (motif and accompaniment), film (objective and subjective), etc. (EP, 76-78)

We can understand, therefore, why Lacan modified Saussure's exemplification of the relationship between signifier and signified from ['tree']/[image of tree] to ['ladies'- 'gents']/[image of two identical and thus indistinguishable (on the level of the imaginary-phenomenal) doors].

ie., 'something in it (ie., the object being referred to — the objet petit a) more that itself (the object as a (temporary) bundle of positive properties)'

Alternatively referred to as rigid designator, point de capiton, master signifier, pure signifier. The point de capiton or pure signifier denotes a signifier without a signified: “the point de capiton is... the word which, as a word, on the level of the signifier itself, unifies [quilts] a given field, constitutes its identity: it is, so to speak, the word to which 'things' themselves refer to recognize themselves in their unity.” (SO, 95-96) The process by which a field is unified is called capitonnage.

Unless, of course, I am directly engaged in a very principled and pedantic discourse addressing the very question of meaning.

A long answer involves a detour through Lacan's graph of desire — a detour which we will forgo for now. However, for purposes of completion, we include Zizek's rendition of it in the Appendix.

One might wonder what would happen if, for some reason, the big Other suddenly revoked its guarantee. The answer?: An experience of obscene disgust and horror. Lacan has an exact term for this 'revocation': separation . (FC, 213) It refers to the separation between the object's symbolic identification (SI) — reality — and the objet petit a — the real. As an illustration of how this experience may come about it is sufficient to recollect the scene in James Cameron's Aliens, in which the protagonists are marching down a corridor in a former colony looking for survivors when, suddenly, the surrounding walls begin to undulate. It thus betrays its status as the inside of a living alien. The horror corresponds to the separation between the symbolic identity as 'corridor' and the object to which it refers. Similarly, the final scene in Chaplin's City Lights stages a separation when the flower girl's identification of the generous person as 'prince charming' collapses into a disgusting 'tramp'. (ES, 1-9)

Using the example of 'democracy' as a master signifier, Zizek elaborates at length:

"The essentialist illusion consists in the belief that it is possible to determine a definite cluster of features, of positive properties, however minimal, which defines the permanent essence of 'democracy' and similar terms — every phenomenon which pretends to be classified as 'democratic' should fulfill the condition of possessing this cluster of features. In contrast to this 'essentialist illusion', Laclau's anti-essentialism compels us to conclude that it is impossible to define any such essence, any cluster of positive properties which would remain the same in 'all possible worlds' — in all counterfactual situations.

In the last resort, the only way to define 'democracy' is to say that it contains all political movements and organizations which legitimize, designate themselves as 'democratic'; the only way to define 'Marxism' is to say that this term designates all
movements and theories which legitimize themselves through reference to Marx, and so on. In other words, the only possible definition of an object in its identity is that this is the object which is always designated by the same signifier — tied to the same signifier. It is the signifier which constitutes the kernel of the object’s ‘identity’.

Let us return again to ‘democracy’: is there -- on the level of positive, descriptive features — really anything in common between the liberal-individualist notion of democracy and the real-socialist theory, according to which the basic feature of ‘real democracy’ is the leading role of the Party representing the true interests of the people and thus assuring their effective rule?

Here we should not be misled by the obvious but false solution that the real-socialist notion of democracy is simply wrong, degenerated, a kind of perverse travesty of true democracy — in the final analysis, ‘democracy’ is defined not by the positive content of this notion (its signified) but only by its positional-relational identity — by its opposition, its differential relation to ‘non-democratic’ — whereas the concrete content can vary in the extreme: to mutual exclusion (for real socialist Marxists, the term ‘democratic’ designates the very phenomenon which, for a traditional liberalist, are the embodiment of anti-democratic totalitarianism). (SO, 98-99)

61This, of course, is analogous to the psychoanalytic situation in which the analyst serves as guarantor of meaning, i.e., as ‘subject supposed to know’.

62Lacan’s concepts of separation and symbolic order can also be used to explain the phenomenon of ‘losing face’ (i.e., when the identity of someone, whose real person was attached to a particular S1 — as in ‘honourable’, ‘respected’, ‘trustworthy’, etc — is put into question). Thus, the more rigid the symbolic order (repository of Sis), the more necessary it is to attempt to conduct oneself in the company of others in a manner which will ‘save face’. The rigidity of the Japanese big Other, for example, explains why ‘saving face’ (i.e., the staving off of the social vertigo experienced when one discovers that someone is no longer the person whom you thought they were) is so important in the social discourse. (ES, 63, note 17)

63Here we may think of the examples of a person of colour who makes a decision to go to a particular law school based on its race-discrimination policies; or of a person who attempts to enumerate the failures of another’s partner in a bid to convince him/her to abandon him/her.

Alternatively, we could recall Fetyukovitch’s famous speech as counsel for Dmitri Karamazov in Dostoyevsky’s The Brothers Karamazov. Did he not repeatedly point out how an argument can cut both ways?

In the context of pornography we could refer to a case in which the argument being advanced emphasized its harm so as to distinguish it from its competing definition of speech, the latter of which is, of course, protected by the first amendment. As the Hudnut case [American Booksellers Association v. Hudnut 771 F. 2d at 323 (7th Cir. 1985)] showed, such evidence can be turned on its head: “[T]he court held that pornography’s importance as speech can be measured by its effectiveness in doing the harm that it does”— Catherine MacKimon, ‘Pornography as Defamation and Discrimination’ (1991) 71 Boston University Law Review 793 at 812.


65The paradigm, of course, is Kafka’s Joseph K. in The Trial. In that case, the victim of the bureaucracy-gone-awry also persists in searching for some meaning to his arrest; or else he persists in believing that rational argument can convince the State of the absurdity of the situation. The acute sensitivity to the irreducible contingency in the generation of meaning and its accompanying feeling of arbitrariness is, of course, very relevant to the plight of the Jewish people during the second world war and depicted so poignantly by Steven Spielberg in Schindler’s List.

66Rorty approaches this idea when he states that solidarity should be conceived as “the ability to see more and more traditional differences (of tribe, religion, race, custom, and the like) as unimportant when compared with similarities with respect to pain and humiliation” (Rorty, Richard, Contingency, Irony, Solidarity (Cambridge: CUP, 1989) at 192) as quoted in Salecl, Renata, ‘Cogito, its Rights and Fantasy’ (1992) 9(2/3) American Journal of Semiotics 105 at 115.

However, as Salecl points out, he still remains firmly within the imaginary/symbolic problematic by subscribing to a clear split between the public (bazaar) and the private (club). The appeal to pure form,
however, does not come off without a certain pathological remainder: Salecl, Renata, ‘Woman as Symptom of Rights’ (1993) 12(2) Topoi 89 at 93-94.

67See, for example, Hutchinson, Allan, Dwelling on the Threshold (Toronto: Sweet & Maxwell, 1988).

68It is in this sense that the Alien trilogy can be read as an essay on the Lacanian subject. In the Ridley Scott (Alien) and James Cameron (Aliens) versions we see how the identity of lieutenant Ripley (Sigourney Weaver), or of the community, is consolidated by its opposition to an external alien. In David Fincher’s Alien³, however, we see in the final scene how this foreign substance is actually within the subject herself. The parallel to traditional mythic narratives describing the hero’s trials and tribulations in his bid to slay the monster should be apparent. The external monster to be killed is merely the positivization of the ‘internal’ monster, i.e., our own internal blockage. Here, the fantasy consists in the belief that the eradication of the external impediment will bring things to an euphoric state of bliss. (See also SO, 78-79, and TN, 275, note 32.)

69And this is why it is a bit worrisome when, in the context of the environmental movement, we hear people talk of a return to a fully-balanced, dynamically interconnective, wholesome, relational state of the earth devoid of conflict (as if this were possible). If one is not careful, this can quickly turn into a recipe for totalitarianism.

70In the Nazi-Jew scenario, this would, in effect, entail recognizing the Jew as ourselves.

71Cf. the hysterical Mary in Rossetti’s painting ‘Ecce Ancilla Domini’, or the hystericization of Christ in Scorsese’s The Last Temptation of Christ. (SO, 114) Both subjects ask the same question: ‘Why me?’

72Cf. Shakespeare’s Hamlet in which the imposed mandate (by the ghost of Hamlet’s father) to avenge his father’s death is subverted by the supplementary instruction not to harm his mother. It is she, therefore, who triggers, for Hamlet, the Che Vuoi? (SO, 120)

An important caveat:

The usual definition of fantasy (‘an imagined scenario representing the realization of desire’) is... somewhat misleading, or at least ambiguous: in the fantasy-scene the desire is not fulfilled, ‘satisfied’, but constituted (given its objects, and so on) — through fantasy, we learn ‘how to desire’. In this intermediate position lies the paradox of fantasy: it is the frame co-ordinating our desire, but at the same time a defence against ‘Che vuoi?’, a screen concealing the gap, the abyss of the desire of the Other. Sharpening the paradox to its utmost — to tautology — we could say that desire itself is a defence against desire: the desire structured through fantasy is a defence against the desire of the Other, against this ‘pure’ trans-phantasmic desire (i.e., the ‘death drive’ in its pure form).

We can now see why the maxim of psychoanalytic ethics as formulated by Lacan (‘not to give way on one’s desire’) coincides with the closing moment of the psychoanalytic process, the ‘going through the fantasy’: the desire with regard to which we must not ‘give way’ is not the desire supported by fantasy but the desire of the Other beyond fantasy. ‘Not to give way on desire’ implies a radical renunciation of all the richness of desires based upon fantasy-scenarios. In the psychoanalytic process, this desire of the Other assumes the form of the analysis’s desire: the analysand tries at first to evade its abyss by means of transference — that is, by means of offering himself as the object of the analyst’s love; the ‘dissolution of transference’ takes place when the analysand renounces filling out the void, the lack in the Other. (SO, 118)

... [And] how does an empirical, positively given object become an object of desire; how does it begin to contain some X, some unknown quality, something which is ‘in it more than it’ and makes it worthy of our desire? By entering the framework of fantasy, by being included in a fantasy-scene which gives consistency to the subject’s desire. (SO, 119)

74We could also add that the traversal of fantasy is not a one off thing. It requires the hard work of repeated traversals, i.e., to show in as many ways possible how our fantasy is a contingent formation. In this sense, we could say that Zizek’s work constitutes an attempt to take philosopher-theoreticians through their own fantasy of subject construction. Could we not view his work as just so many different ways to traverse our fantasy vis-a-vis the subject?

75See Appendix.
Zizek illustrates this process by referring to the paradigmatic Jewish case:

To exemplify this necessity of supplementing the analysis of discourse with the logic of enjoyment we have only to look again at the special case of ideology, which is perhaps the purest incarnation of ideology as such: anti-semitism. To put it bluntly: ‘Society doesn’t exist’, and the Jew is its symptom. [In other words, “the stake of social-ideological fantasy is to construct a vision of society which does exist, a society which is not split by an antagonistic division [ie., the lack or inconsistency of the big Other], a society in which the relation between its parts is organic, complementary.” (SO, 126) “The notion of social fantasy is therefore a necessary counterpart to the concept of antagonism [the real-jouissance that resists symbolization]: fantasy is precisely the way the antagonistic fissure [the lack of the big Other] is masked... The thesis of Laclau and Mouffe that ‘Society doesn’t exist’, that the Social is always an inconsistent field structured around a constitutive impossibility, traversed by a central ‘antagonism’...[implies the necessary failure of every interpellation/identification]” (SO, 126-127)]

... [W]e can articulate another formula of the basic procedure of the ‘criticism of ideology’, supplementing the one given above: to detect, in a given ideological edifice, the element which represents within it its own impossibility. Society is not prevented from achieving its full identity because of Jews: it is prevented by its own antagonistic nature, by its own immanent blockage, and it ‘projects’ this internal negativity into the figure of the ‘Jew’. In other words, what is excluded from the Symbolic (from the frame of corporatist socio-symbolic order) returns in the real as a paranoid construction of the ‘Jew’.

We can also see, now how ‘going through’ the social fantasy is likewise correlate to identification with the symptom. Jews are clearly a social symptom: the point at which the immanent social antagonism assumes a positive form, erupts on to the social surface, the point at which it becomes obvious that society ‘doesn’t work’, that the social mechanism ‘creaks’. If we look at it through the frame of (corporatist) fantasy, the ‘Jew’ appears as an intruder who introduces from the outside disorder, decomposition and corruption of the social edifice — it appears as an outward positive cause whose elimination would enable us to restore order, stability and identity. But in ‘going through the fantasy’ we must in the same move identify with the symptom: we must recognize in the properties attributed to ‘Jew’ the necessary product of our very social system; we must recognize in the ‘excess’ attributed to ‘Jews’ the truth about ourselves. (SO, 125-128)


Sloterdijk, Peter, Critique of Cynical Reason (Minneapolis: University of Minnesota, 1987).

What we call ‘social reality’ is in the last resort an ethical construction; it is supported by a certain ‘as if’ (we act as if we believe in the almightiness of bureaucracy, as if the President incarnates the Will of the People, as if the Party expresses the objective interest of the working class...). As soon as the belief (which... is definitely not to be conceived at a ‘psychological’ level: it is embodied, materialized, in the effective functioning of the social field) is lost, the very texture of the social field disintegrates.” (SO, 36)


Another, perhaps more persuasive, argument appeals to empirical studies which clearly show a systemic discrepancy between population breakdown (along lines of class, race, gender, etc.) and, for example, employment type breakdown.

Ie., the temptation of filling in the lack with essentializing pathological content.

Derrida, Jacques, ‘Force of Law: The “Mystical Foundations of Authority”’ (1990) 11 Cardozo Law Review 919 at 943. We could relate Derrida’s suspension of the law to the court-room process. Could not the procedure of distinguishing a case on its facts be conceived as a supremely ethical gesture whose aim is to garner respect for the specificity of the case (analogous to the particularity of fantasy)? Is not its
function to briefly suspend the law so that it can be reinvented anew (i.e., rearticulated to another principle of interpretation)?


Though the effects of phraseology are more dramatic in the context of legal battles, such effects should not go unnoticed in our daily lives. This can perhaps be brought to the fore in the well-recognized observation (in areas of empirical research) that the manner in which signifiers are strung together in survey questions can have profound effects on the kinds of answers elicited. Thus, though the question posed to male employees of whether they would desire a ‘parental leave’ option is met with resistance, the question phrased in terms of ‘a few days off to spend with the children’ would produce a more positive response.


Here it might be helpful to think of particular instances of physical/economic power relations (between, for example, man and woman; porn industry and women; logging industry and environmentalists).

Salecl, ‘Woman as Symptom or Rights’, supra at 92.

Salecl, ‘Woman as Symptom or Rights’, supra at 96.

Using the signifier universe model to apprehend the legal decision-making process shows us in what way the anecdotal observation that ‘a legal outcome depends on what a judge had for breakfast’ has a grain of truth. It is also instructive to relate it to the popular renditions of chaos theory. Is the reference to breakfast not meant to convey the subtle mechanics of meaning? Is it not meant to show us how a purely contingent and trivial occurrence can result in the emergence of a new master signifier which, through a kind of domino effect, can translate into a significantly transformed symbolic order and corresponding universe of meaning? Can we not see, here, the butterfly effect, and how, in this case, personal ideologies can potentially affect judicial outcomes?

So, if psychoanalytic social theory is concerned with empirical studies which map out symbolic universes, how exactly do empirical statistical studies fit in this picture? Of what use are studies that tabulate trends in income differentials generally and comparatively? Of what use are statistics showing numbers of single mothers on welfare vis-à-vis single fathers on welfare? Apart from the usual interpretive caveat when it comes to any kind of statistical study, the poststructural approach treats each of these findings as separate floating signifiers which have the potential to be equivalently linked about specific master signifiers. It tells us that one cannot in advance determine the master signifier it will be linked to. Indeed, it frequently serves to support several, often incompatible, master signifiers. Hence, the hegemonic struggle. For example, statistics showing that the average Asian high-school student consistently scores higher than the average North American high-school student may be taken to justify the natural superiority of Asians over North Americans, or it can be taken to justify a reexamination of teaching methods, and so on. Also witness the debate among environmentalists, loggers, and logging companies: statistics on hectares of lost forests are linked to the images of open wounds and of an ailing earth, while the statistics showing numbers of lost jobs are linked to struggling family units whose disintegration threatens our fragile social fabric. In the equally charged abortion debate, on the one hand, numbers of abortions are tied to biblical scriptures, to the right to life, and to foetal images in their advanced stage of development; while on the other, statistics on poverty, population, and psychic traumas resulting from being brought up unwanted, are linked to corresponding signifiers, including bodily violations of women, and to the right to security.

The status of statistics as floating signifiers means that how exactly they get threaded into various logics is limited only by the weaver’s imagination. When confronted with an especially twisted and offensive series of equivalences, it does no good to point out that the twisted portrayal of facts does not correspond to the ‘hard’ facts that the statistics were meant to convey. Such a response will not convert anyone who is not already converted. It has little value except as a rhetorical ploy. In this way of thinking, the ‘correct’ response would be to counter with another (subversive) equivalential logic. (Of issue here, of course, is the relative accessibility to information media through which such equivalential logics can be transmitted. What accounts for perceived informational imbalances: unconscious ‘structural constraints’, conscious ‘vested interests’, etc? This will be taken up in subsequent chapters.)

Butler, Judith, Bodies That Matter, supra at 13.

Ibid. at 15.

All the while remembering that such factors are abbreviations of particular signifier constellations (of the judge, of the client, etc.).
To what extent such an ethical shift will be perceived as a shift with noticeably differing results is a different issue. The cynic will doubtless point out that this new tactical form cannot obviate the possibility of abuse, namely, to serve as a convenient cover or conduit of implicit values. Such a charge, of course, is valid. The problem, however, is that it is always valid -- even to the point of subverting its own constructive intention. The psychoanalytic stake is the fostering of a less pathological state, both on the part of the progressive strategist (i.e., an attempt to avoid the totalitarian temptation of eliminating all that could possibly be conceived as a threat to the state), and on the part of the respondent (i.e., to achieve a certain distance from his or her fantasy).

Much of this chapter dealt with theory. However, it is hoped that the practical, especially strategic, implications will be apparent. For instance, when combined with the ethics of the real, the implication, from the legal perspective, especially insofar as it concerns itself with dispute resolution processes, is that they should be seen more as a political process. In other words, they should be seen as processes in which an antagonism is transformed into an agonism. Also, our analysis in terms of signifiers (our only access to jouissance) means we can more fully appreciate difference between a simple, low profile, family case, a criminal case, and a case whose outcome is seen to affect a larger segment of the population (loggers vs. environmentalists). This could be conceived, for example, in terms of the signifier's inertia.
CHAPTER TWO: Doing Theory

In this theoretical chapter, we intend to appeal to the previous chapter's outline of Slavoj Zizek's psychoanalytic onto-epistemology and to attempt to highlight the way in which it can be said to follow the logic of the signifier. In doing so, we shall draw upon a 'background' working knowledge of the recent work of Ernesto Laclau. We will then attempt an 'application' of this logic to specific contexts in order to show its explanatory potential. Finally, we will engage with the broader debate over the limits of modernism and the significance of postmodernism.

The Logic of the Signifier: Toward a Science of Discourse Analysis

The logic of the signifier describes the laws by which any system of signification works. And by signification we mean to imply that which is meaningful: the discursive. Now, one way to approach the logic of the signifier is not so much by looking at the nature of discourse directly, but rather by looking at it askance. We hope to show that an understanding of such laws can best be achieved as a by-product rather than a main product, much like (falling in) love cannot be pursued directly (i.e., planned) but simply 'falls' from the outskirts of desire. In other words, we are suggesting that a more
thorough comprehension of the mechanics of signification will emerge by attempting to think the *limits* of discourse.

What can we say about such limits? Well, we could begin by pointing out that these limits, indeed any limits, in order to qualify as legitimate must announce their presence from within the system whose limits we are trying to think. At the same time, however, we are prevented from directly signifying those limits. Why? Because if we could so apprehend them with the symbolic resources at our disposal, they would immediately, and by *definition*, cease to be limits. Let us clarify this last remark by recalling the Saussurian commonplace that all identity is differential in nature; that each signified comprises the bundle of a signifier’s differences from all other signifiers. Our system, in this view, is a symbolic order of *differences*. Thus, adding another signifier, another difference, to the system in order to signify its limits is a self-defeating exercise. This is because this new signifier is an internal moment of the system of signification and cannot, therefore, signify its limits in a direct way. In other words, the limits of discourse cannot have a signifier of its own.

So, how to resolve this impasse? Simply by recognizing that every signifier, and thus every identity, is constitutively *split*. On the one hand, it must represent its own particular content (the bundle of differences from all other signifiers in the system); and on the other hand, it must have the capacity to represent the limits of the system (and thus the *constitution* of the system along with the radical exclusion this entails). In other words, relational identity is split between its other-differential (System, S2) and Other-antagonistic (Anti-System, $) guises. We can also think this split using the heterogeneous logics of difference and identity. On the one hand we have the logic of difference which, as we pointed out, is responsible for the meaning of the signifier. On the other hand, we have the logic of equivalence by which signifiers are united as, and thus simplified into, a system. We see, therefore, that for a signifier to signify a totality the logic of simplification (identity) must dominate over the logic of complexification.
(difference). And what can this mean but the gradual evacuation of the signifier's differential identity to a point of pure nonsense; to a vessel devoid of differential meaning? We now have another way to conceive of Lacan's empty (master) signifier and its accompanying mechanics of capitonnage. In its empty mode of existence, this 'chosen' signifier serves as a surface of inscription upon which each of the system's signifiers inscribe themselves. We have, in other words, a transition from the Lacanian formula 'every signifier represents the subject for another signifier' (ie., the non-all logic of the feminine) to 'the master signifier represents the subject for all other signifiers (of the system)' (ie., the male logic of the 'all').

So, the emergence of a master signifier (S1) constitutes, and represents, a system of differential signifiers (S2). But, as we have also seen, establishing a system implies a radical exclusion of a real, unconscious Other ($). This Other, therefore, is implicated in each of the system's signifiers and is thus also represented in S1, but in inverted form. In other words, S1 is indelibly marked by $. We can appreciate this better by recalling that S1 is the empty signifier, the signifier of the lack; whereas $ is the inverse of this: the lack of the signifier. In short, they constitute two sides of the same object: the objet petit a. And it may help us to refer to the paradoxical geometry of the mobius strip to conceive of this relationship. The local property of such an object points to a certain dissonance or incompatibility between the two sides; whereas the global property points to a (surface) commonality which betrays a radical relation of interpenetration and mutual reliance.

And do we not here have just another way of describing the contingent nature of Laclau and Mouffe's classic notion of antagonism; that every identity is always grounded in a 'constitutive outside' whose specific content can never be determined in advance? For contingency, as it concerns the two poles (S1 and $) of a relation, seeks to evoke two aspects. First, that, though the specific content of each of those positions is
circumscribed by the availability of potential fillers (floating signifiers), they are not
determined by them. And second, that, though each is not determined by the other, each
depends on the other for the constitution of its identity. And it is this second aspect
which addresses the false accusation, usually lodged by traditional marxists and rightist
conservatives, that the contingency anti-essentialists are so ready to valorize
automatically degenerates into radical nihilism. The limiting horizon of available
possibilities (floating signifiers) always prevents a nihilistic infinite play.

But if we cannot rationally deduce the particular content (objet petit a) to embody
what Laclau calls the ‘form of fullness’ (S1) from the horizon of possibilities we are
confronted with, what process do we invoke to create a link? In other words, if we
acknowledge the irreducible incommensurability between filler and filling function, what
establishes such a relationship (which, incidentally, can only be temporary and
precarious)? The answer, of course, is hegemony: the political-interpretive struggle to
hegemonize the universal form of fullness by one of a number of particular contents.

We see, therefore, why Laclau emphasizes the importance to (radical democratic)
politics of empty signifiers. Quite simply, they make politics possible. It is the
separation of empty form from particular content that betrays a contingent relation and
thus the possibility of an alternative articulation. And the more empty signifiers emerge,
the freer the society. For a belief in structural determinism comes from misperceiving the
contingent as necessary; and the revelation of the contingent in the heart of necessity
expands the horizon of possibilities. And can we not see, now, why progressive scholars
must advocate as an internal moment of their political program such a traversal of
fantasy? And can we not also see how this insight has been made possible by fully
assuming the split nature of the signifier, a theoretical model which we stumbled upon by
trying to delineate the contours of discursive limits; and a model which will help us better
understand the nature of the subject as structural failure?
Let us now specify a bit more precisely the significance and operation of the misperception of the contingent as necessary. In a first approach, we could say that it belongs to the Lacanian imaginary order, an order in which closure and full identity is achievable; where the filler is rigidly linked to, and misperceived as, the form of fullness itself. In Lacanian jargon, we could describe the emergence of the imaginary order as the (illusory) fusion of the objet petit a with its empty form, S1 (Imaginary=S1+a). It is this fusion that is responsible for the overwhelming feeling of fullness and positivity, a feeling often associated with ego caressing. And we can see now how a democratic ethics of the real calls for a separation of S1 from its object-content (Real=S1-a) so as to permit a hegemonic struggle among alternative competing fillers. As we have noted elsewhere, separation is often accompanied by feelings of deflation, disappointment, negativity, even horror.

But why does the empty master signifier emerge in the first place? The answer, according to Laclau, is dislocation. The incidence of an external discourse (the 'return of the real') dislocates the imaginary filler (objet a) from its hegemonic status as form of fullness (S1) to reveal the real lack ($) that it attempts to conceal -- a lack which is nothing but the subject itself. Thus, we can say that dislocation marks the emergence of the subject. It locates the point at which the structure fails to achieve full identity with itself. We thus have a new relationship between subject and structure: the subject is the contingent failure of structure.

In opposition to the belief that a 'valorization' of contingency implies a nihilistic interrogation and abandonment of structure, contingency actually presupposes structure. In other words, the critique of anti-essentialism which suggests that contingency implies lack of structure must be radicalized and transformed. Contingency does imply lack of structure, but not in the usual nihilistic sense of the phrase. Instead it implies the lack of the structure: a structural antagonism. The structure, though it necessarily circumscribes, cannot ever be determinative, not because of empirical limits, but because the logic of the
signifier dictates a radical exclusion and thus a radical unknown whose effects cannot be predicted. We see, therefore, why such unknowns can only be dealt with one by one as they manifest themselves as instances of the return of the real; in other words, as each successive constitutive outside begins to impose itself upon the system whose very existence and identity relies on that exclusion.

Let us elaborate. We saw how the logic of the signifier is born out of its split nature. A system of knowledge (S2) is formed through the emergence of an empty signifier (S1) which is occupied and represented by a filler (a) and tied, as if by an umbilical cord, to its excluded Other ($)\textsuperscript{1}. In developing this formulation, therefore, we could say that the internal split of the signifier is projected outward onto the political landscape as a social antagonism. In short, Laclau and Mouffe's social antagonisms are made possible by the structure of the signifier.

Now, every identity, every signifier, is supported by such an exclusion. In this sense, each is always already antagonistic, even if its Other has yet to show up. This also explains why, as a matter of strategy, a simple affirmation of difference (between an identity and its Other, as in the American as Good and the Russian as Evil) further entrenches their respective identities. Only with the use of a common language such as the rights discourse, and thus the possibility of an equivalential logic, can the Other begin to impose itself by subverting the identity that excluded it.

But how exactly does its antagonistic Other emerge? We have already suggested an answer: As the 'return of the real'. In other words, what has been excluded from the symbolic order (and thus relegated to the real) in order to constitute itself, eventually begins to reimpose itself. And since the real can make itself felt in the system only in terms of the signifiers available in that system, its presence will be marked by its idiosyncratic symbolic-structural inconsistencies and defects. When, for example, women demand the right to vote or to work, they point to the legal order's inconsistencies. On the one hand, it advocates equality before the law for all persons, and
on the other, it attempts to exclude women from the category 'persons'. The first political articulation of such a demand marks the emergence into the social of an antagonism. We can begin to see, therefore, the significance of the rights discourse for the expression-externalization of relations of domination. This is because rights are, if not theoretically understood as such, certainly circulated in a fashion that suggests an acknowledgment of their split character. They represent not only the specific demand being articulated; they also represent the form of fullness which totalizes similar demands into a coherent opposition (anti-system) that pits itself against the system. The rights discourse provides a language which permits an otherwise excluded Other to begin to be heard in a fashion which, in other circumstances, might have led to a more ready resort to violence.

We could say that the rights discourse takes us a long way along the path to an ethical politics of the real. The separation between the form of fullness and its particular content opens up the space for change. And this separation, of course, is only made possible by the radical ambiguity implied in the split of the signifier, namely, that the particular content stands not only for its own differential meaning, but can also stand for a totalized system of contents which have been linked through articulation. As to which of a number of floating signifier emerges as master, this can only be decided by a contingently hegemonic struggle.

We see, therefore, how the rights discourse attempts to keep alive the split of the signifier in order to accommodate one by one the demands arising from the returns of the real. The alternative to this feminine 'non-all' approach is to enumerate all the possible demands in advance. This would constitute the totalitarian temptation and would subscribe to the masculine logic of the 'all'. For the 'all' logic ignores the laws of the signifier which imply a radical (and thus unknowable) exclusion for the purposes of the constitution of the symbolic order. (EP, 121-126) The totalitarian wallows in the imaginary order because he mistakes the filler as the form of fullness. He does not
recognize that the property that is responsible for such things as overdetermination, radical ambiguity, subversion, politics, humour, and guilt is also responsible for a necessary exclusion-antagonism. He is forced, in other words, to conceal the irreducible split of the Social by repressing it in a symptom. Everything that prevents the Social from constituting itself, no matter how absurd or inconsistent, gets funneled into the symptom (eg., the Jewish conspiracy) and so deflects attention away from the constitutive nature of antagonism. Thus, the totalitarian temptation consists in creating long lists of symptomal properties that must be eliminated. Why? To keep alive the fantasy that the Ideal Society is possible; to keep at bay the real of subjecthood by covering it up with a pathological filler. And, of course, this is why Lacan’s formula for fantasy is $\diamond a$.

Now, we opened our theoretical discussion by deducing the Lacanian logic of the signifier, and we have since invoked it as a principle of intelligibility with regard to such things as identity construction, social antagonisms, the rights discourse, radical democracy, totalitarianism, etc. Are we not justified in claiming that the law of the signifier is too good to be true? And while we are at it, why not interrogate the status of this ‘law’? In what sense can we say that such a logic makes overtures toward what we could call a science? And, perhaps more importantly, in what sense does it pretend to stand aloof from the social practices that it purports to describe? Indeed, Judith Butler goes so far as to suggest that Laclau’s own invocation of these laws of logic suffers from a historico-contextual amnesia. She says, for example, that “Laclau offers us a description of the logical features by which any social practice proceeds, thereby postulating a logic to which social practices are subject but which is itself subject to no social practice.” Or, elsewhere, she asks “[w]hat accounts for the apparent separability of the logical from the social, such that one might appeal to the logic of the social, as if that logic were itself not the distilled and sedimented effect of social practices?”
Of course, we sympathize with Butler’s position that no principle of intelligibility can exist independently of the discursive horizon that engenders its coordinate system and thus orients it. However, to suggest that Laclau should somehow be exempting the operation of this logic from the influence of social practice not only goes against the main thrust of his whole corpus, but also verges on critical negligence, even intellectual dishonesty. This is all the more surprising when one takes into account her normally very close and sophisticated readings of theoretical texts. But here, we have a suggestion so far off the mark that we must pause to regain our balance.

Let us be explicit in order to drive the point home. For the moment, let us be brash enough to suggest that the laws of the signifier occupy a position akin to Newton’s laws of motion. Whereas the latter apply to the discursively constructed physical world, the former apply to the discursively constructed discursive world. Now, does the postulation of such laws imply their radical exemption from the world that gave birth to them? If it is possible to misperceive them as such, Thomas Kuhn’s work should, by now, have laid any such illusions to rest. Not only are scientific laws born out of the phenomenal world, they are also constantly being re-tested and modified. Why? Because the hegemonic status of any set of laws always entails a radical exclusion which can only return as the real. An ethics of science, therefore, would suggest that we be sensitive to observations which are ‘abnormal’, which don’t quite ‘fit’, with the reigning principle of intelligibility. In other words, the ‘return of the real’ provides a source of perturbatory feedback, forcing a constant re-evaluation of scientific laws and reminding us of their inextricable link to the real order — a real order which can only manifest itself from within our symbolic universe through inconsistencies, paradoxes, anomalies. And, as we have said, these comments apply with equal force to the laws of motion which govern the interaction of physical bodies and to the laws of the signifier which govern the interrelation of signifiers, antagonisms, symptoms, and the like. This is why Laclau is explicit on this point, noting that “it is only through a multitude of concrete studies that
we will be able to move towards an increasingly sophisticated theory of hegemony and social antagonisms.” (Emphasis added) (TDS, 235)

We could say, therefore, that the law of the signifier takes its own demise into account in advance. Its reign implies the repression of alternative laws which will return later as the real, either to modify or to replace. We see this quite clearly in the domain of physical science. First, Galileo invented the telescope. Then, Tycho Brachae amassed a towering collection of planetary observations. This was then followed by a grinding distillation into a few simple laws by Johannes Kepler, which were promptly perfected by Newton’s inverse square laws. But were they really immutably perfect? Of course not. Technological development opened up the door to measurements of ever increasing sensitivity — measurements which could not properly be explained by Newton’s laws. We had, in other words, a case of the return of the real the upshot of which was the dislodgment and replacement of the hegemonic status of Newton’s laws by Einstein’s general theory of relativity. We see, therefore, how we can argue that the laws of the signifier belong to a science in the strictest sense of the term.

And this brings us nicely to the topic of social change and how that is related to the logic of the signifier. For it is becoming increasingly apparent that the rapid technological development and social change that accompanies our late capitalist societies helps us more fully grasp this logic. We live in a world in which commodification is the name of the game and in which there is a simultaneously diminishing commodity life expectancy. Under these circumstances, we necessarily become aware of the contingency of the definitional process, even if this awareness operates on an subconscious level. However, in a world that subscribes to predictability, tradition, order, and inter-generational constancy, objects appear to possess an unchanging and definable essence. We can see, here, how the (traditional) marxist versus
postmarxist debate can be historically located at a critical point of late capitalist development.

The accelerated rate of social change operates to dislodge the appeal to essentialism from its hegemonic status. It reveals essentialist categories such as 'class' to be only special cases of a more general anti-essentialist sensibility, just as Newton's laws of gravitation constituted a special case of Einstein's general theory of relativity. We could say that we live in an era of a new common sense. But if we wanted to be accurate, we would have to say that we are living in an era of common nonsense. This is because the old world of tradition subscribed to a descriptivist view in which meaning was fixed and independently graspable. In that world, we could indeed have a common sense, shared by anyone and everyone. We lived in an imaginary order in which the filler was misperceived as the form of fullness ($S_1+a$). Today's world, however, repeatedly confronts us with the arbitrary, happenstance, and precarious nature of the definitional process. We experience, in other words, a plethora of separations ($S_1-a$) which give rise to a new common non-sense that recognizes (though may not want to admit) the constant overdetermination, subversion, and unfixity of meaning. We have, in other words, the emergence of empty signifiers (non-sense), whose existence makes possible the symbolic order, and which are always linked to their radical Other (jouis-sense). What we find, however, more often than not, is an attempt to suppress this shocking fact by regressing to a nostalgia for a long-lost certainty. The contingency of meaning is so unbearable that we often redouble our efforts to pin down a common sense. And the ambivalence between fully assuming the radical historicity of all being and attempting to ignore it by appealing to foundationalism can be seen reflected in the legal discourse, from natural law, legal positivism, legal liberalism, and legal marxism, to legal realism, critical legal studies, minority critical legal studies, and law and society scholarship.

This is why the theorization of this new common (non)sense -- anti-essentialism -- is of crucial importance to the progressive left and, specifically, to the viability of a
radical democratic project. Can we not now appreciate the significance of the work of such authors as Laclau, Mouffe, and Zizek? They have fully recognized the totalitarian regression that our rapidly changing society could easily encourage. The proliferation of nationalisms in the wake of the Communist break down, and the sprouting of religious fundamentalisms and racisms in Western capitalistic societies should present us with sufficient sobering evidence.

We need to acknowledge and fully assume the life-cycle of the signifier. And here we could point out, though it should come as no surprise, how such a life cycle is played out in Lacan’s typology of the four discourses. Let us begin with the discourse of the university. This discourse evokes such notions as objectivity, spatiality, reification, sedimentation; in short, an ordered social. We are presented with a system (S2) that is assumed to be natural and inevitable but which conceals the empty signifiers (S1) that structure that system. We find ourselves, in other words, in the imaginary realm of ideological illusion. The paradigm exemplification of this mechanics, of course, occurs in the legal discourse. In that instance, we have an attempt to resolve disputes by asserting an unquestionable essence of legal categories and the inevitability of just outcomes. However, the attempt to impose the system of knowledge upon disputants invariably causes the hysterical subject to emerge: there is always a residual resistance that evidences the unentrifiable real of the subject. As we noted in chapter one, this resistance often comes in the form of the question ‘why me?’ ‘why are you telling me what I am?’

A quarter of a revolution brings us to the discourse of the analyst. Here, the real subject produced in the discourse of the university surfaces into consciousness. We experience a lightning sensation of dissatisfaction with the reigning order. Suddenly that which tried to pass as Order is seen as Disorder, and the particular content which incarnated that Order is dislodged from its hegemonic position. Such dislocation gives
rise to an alternative content that seeks to incarnate a new Order in antagonistic opposition to the old (dis)Order. The discourse of the analyst, therefore, is of the order of the temporal or political. It is responsible for the creation of new, empty master signifiers into which new contents can be inserted. It reproduces the Lacanian act whereby the content is separated from its form of fullness to open up the space for new alternatives. It reveals how every identity (signifier) is dislocated insofar as it is traversed by an antagonism (split) and thus prepares the way for the discourse of the hysteric.

Now, we just saw how the frustration experienced in the analytic discourse gave rise to new master signifiers. In the discourse of the hysteric, we have the subject as lack in the position of social lack -- a lack which solicits competing master signifiers for (ful)fillment. In other words, in terms of the logic of the signifier, we find ourselves at the stage of hegemonic struggle and political argument. And this brings us directly to the discourse of the master, for the decision declaring what content should finally incarnate which master signifier can only be tautological. It can never be grounded in a rational foundation. It can only be the result of a radically contingent and hegemonic intervention which attempts to conceal its antagonistic Other. But let us remember: Once the decision has been made, if the historicity of its being is not kept alive, we find that it soon becomes an unquestioned part of the social fabric. In other words, we come full circle to the discourse of the university whose ordered and stable system of differences conceals the power relations that made it possible.

Can we not see here, therefore, the replication of the cycle of the signifier (or, alternatively, the life-cycle of an antagonism)? First, the split nature of the signifier (and subject) is concealed in the deep recesses of the social (discourse of the university). Then, we have the surfacing of the split, the emergence of the real subject of the signifier (discourse of analyst). Following that, there is a struggle among competing fillers which strive to appease the lack (discourse of hysteric). And finally, we have the contingent hegemonization of the form of fullness by a particular content (discourse of the master)
whose history, if forgotten, returns us to the covering-over of the split (discourse of the university) -- a split without which such cyclical reifications and dereifications would have been impossible.⁹

Now, lest we begin to think that these theoretical ruminations have no practical relevance, let us see how the logic of the signifier can be used to explain several discursive developments in the realm of law. (Of course, we intend to make a more thorough implementation of the laws of the signifier and its subject in the context of the rights discourse, but this should serve to quench an immediate curiosity.)

Sample Readings

Gay Rights and Gay Strategies

In the context of the gay movement, we will see how mainstream heterosexual identity is consolidated through its opposition to a gay and lesbian ‘outside’. Gays and lesbians have been, and often still are, perceived as a threat to the heterosexual norm. Now, what is this if not an exemplary case of Laclau and Mouffe’s antagonistic relation? We have two identities which are only partially and antagonistically constituted. On the one hand, the heterosexual is incomplete inasmuch as it relies on an Other to recognize itself as heterosexual. On the other, the homosexual is incomplete insofar as the Other is perceived as an obstacle to the realization of his or her full identity. In looking at the life cycle of this particular antagonism, we hope to show how the logic of the signifier can serve as a powerful explanatory model in accounting for the critical role played by the rights discourse in making the gay and lesbian movement one of the strongest minority lobbies in the US.
In the beginning — a beginning which could, perhaps, be traced to the raid of the New York gay bar, Stonewall Inn, on June 27, 1969 — there was antagonism: verbal and physical harassment of gays, followed by reciprocal and retributive behaviour, followed by a spiraling escalation in intensity and frequency. The retroactive byproduct of such a temporal dislocation of the social fabric, however, was to push back in time the ‘original’ beginning and create a myth of origins — a nostalgic origin devoid of antagonism, and one which we would gladly return to. The myth, therefore, is not only retrospective. It functions as an impetus toward an ideal future — one that will serve to heal the wound of the social: the real antagonism. And it does so by offering itself up as a surface of inscription: a general form of fullness which competing programs (interpretive principles) vie to incarnate.

The problem, of course, is that the reigning program (systematic silencing and marginalization of gays and lesbians through written laws and unwritten customs; the insistent non-recognition of gays as a minority group) is usually so well installed in its position of the solution that the contingent nature of its hegemonic status is hidden. In other words, the content has become synonymous with the very form of fullness, thus collapsing and concealing their radical incommensurability. In this instance we find that by offering the exact counter program matters were exacerbated. Why? Because a strategy which advocates an open and insistent demand for visibility and affirmation of the difference of identity is merely the inverted image of the dominant strategy. It merely assists in the entrenchment of each antagonist’s (partial) identity.

The worsening antagonistic stalemate that such a strategy gives rise to was exemplified in the historical trajectory of the gay movement. It is worth recalling that “polls in the early 1970s showed that over 70% of Americans thought homosexuality was wrong.” viewing them as deviant, sick, immoral, and evil. In this context, therefore, an affirmational strategy involving such slogans as ‘say it loud, gay is proud’, ‘gay is good’,
and 'three-five-seven-nine, lesbians are mighty fine' merely served to cement mainstream heterosexual identity through antagonism.

So what would a subversive strategy look like? How can one wrest the dominant and repressive program from its role of hegemonic (im)posture? The only way to do this, of course, is to appeal simultaneously to a universal principle which unites both antagonistic forces and to the particular demands made by the oppressed. It is suggested that the concept of rights can and does act as just such a Derridean hinge.

As we noted earlier, the notion of 'right' (or any other signifier) is constitutively split. It designates not only a particular demand (the right to spousal benefits, the right to become a member of the clergy), but also a universal demand (the right to a right, the right to be treated equally). Drawing from the same discursive material used by the dominant group to justify exclusion, and by creating a series of equivalential links between the particular demands made by the minority group and the already satisfied demands by the dominant group, a displacement is effected such that the stark line separating the 'friend' from the 'enemy' is blurred and transformed into a more fluid boundary separating 'friend' from 'adversary'.

And this is exactly what we see in the development of the gay movement. Gay activists found they were able to begin conversation by engaging in the rights rhetoric. Significant strides were made possible as the affirmation/scourge impasse was superseded by a reorientation of the discourse toward the issue of discrimination. This was facilitated by the growing number of violent anti-gay incidents and the emergence of a new sociological category, 'gay-bashing', which was, in turn, quickly subsumed under another classifier, 'hate crimes' -- a class which included crimes against already-recognized minority groups, such as black, Hispanic, and Jewish persons. Through such displacements, mainstream society was thus confronted simultaneously with the visibility of sexual minorities and their (for once) legitimate recognition. The fact that such recognition was accorded through victimage rhetoric and negative rights (rather than
affirmation rhetoric and positive rights) should not obscure its manifestly subversive function (recognition of gays as a legitimate minority group). And as Andrew Jacobs points out, this shift in discourse so apparent in popular discourse can also be readily discerned in both judicial discourse (for example, *Bowers v. Hardwick*¹²), and political discourse (for example, the debates surrounding the proposed (but vetoed) 1991 California Assembly Bill 101¹³).

So what conclusions can we draw from this general pattern of discourse evolution such that while public disapproval of homosexuality has remained constant, there has nevertheless been an increase in 'formal' tolerance. Can we not detect the quiet operation of the logic of the signifier? What is the production of the category 'gay-bashing' if not evidence of the emergence of an empty signifier which points to social dislocation; which suggests that something is out of joint; that something doesn't quite fit; that something is amiss; that something needs to be set straight? The empty signifier, therefore, operates as a surface of inscription on which different 'rectifying' proposals compete for hegemony: do we pass anti-hate laws for the protection of gays and lesbians? Do we remove institutionalized norms which discriminate against gays and lesbians? It provides some breathing space -- a buffer zone -- to ease an otherwise brittle and highly volatile antagonistic deadlock.

And what is this if not evidence of the subject as vanishing mediator so characteristic of Lacan's discourse of the analyst? For a brief moment we witness the emergence of a structural lack; a point at which the social structure is not at peace with itself. And no sooner do we become aware of it than it is quickly filled in by a hegemonic 'solution', thus covering up the traces of the contingent nature of its institution.
Undecidability and Identification: Politicizing the Legal Categories of Homosexuality and Pregnancy

In his article ‘Representing Identities’, Dan Danielsen has convincingly argued that legal discourse is inhabited by an irreducible undecidability that is the hallmark of what Chantal Mouffe calls the political: an arena in which an array of possible interpretations-decisions vie for hegemony. In his attempt to reveal this basic undecidability, Danielsen examines doctrinal argumentation and legal representation in the context of pregnancy and homosexuality.

In both contexts, the doctrinal approach proves unhelpful in establishing a framework with which to predict outcomes or plan strategies. He finds, for instance, that establishing the courts’ positions on certain key issues (Is the agent responsible for his/her conduct? Is his/her trait a result of natural or social environment? Does the agent have any choice over his/her traits?) does not have any bearing on the final decision. Indeed, he finds that identical doctrinal stances can lead to opposite results.

Similarly, the representational approach leaves no room for a consistent critique of the portrayal of pregnancy and homosexuality in legal discourse vis-à-vis more ‘authentic’ representations. This approach draws upon criteria other than legal doctrines or outcomes with which to judge a decision, namely, representations in the ‘real’ world. The problem, of course, is that the experience outside the courts is not homogeneous. Rather, we tend to find an irreducible diversity/incompatibility of images in our extra-legal common sense. We find, for instance, appeals to a person’s identity as inherent and status-like, or manifest and conduct-like, or a mixture of both.

What the above two approaches have in common, Danielsen implies therefore, is a reliance on an old-fashioned concept of false-consciousness; that there is, indeed, a discoverable and objective truth that we can discern and use as a point of critical departure. They share the common presupposition that identities are either re-presented
or mis-re-presented; that they are always present (fully constituted) in advance and that each representation is therefore either true or false. They do not allow for the possibility of a deficient or partially-constituted identity; an identity in the making. In short, they ignore the possibility of an in-situ attempt to create a new identity, thereby suppressing the emergence of the subject as lack. We can thus begin to discern a role for the progressive critic: to expose the empty space which is so rapidly filled; to make plain the historicity of being; to make visible the contingent relation between the content of the identity and the lack which it attempts to fill. The critic thereby widens the horizon of possible (and partial) identities which can compete for hegemony. Danielsen concludes:

Perhaps we must recognize that legal discourse is itself a site for ongoing interpretive struggle over the meaning of identity, rather than an independent system of fixed images and rhetorical tropes which merely describes and distorts our experience. To do so might involve a legal practice which seeks to understand and strategize about the ways in which legal discourse through its very indeterminacy, might be able to provide the space for our complexity and differentness to be represented but not determined.17

Emptying the 'Family'

The constitutive gap that defines every signifier can also be seen in legal discourse within the context of the family. Ever since this gap’s early manifestation as the crack that separated Church and State, the split has traveled ever more deeply into the sedimented strata of our society. And one of its more recent casualties has been the institution of the family.

As a result of the penetration of the democratic ideal of equality into evermore social spaces, there have been a growing number of dislocations. Many of these have centred around the family which has, therefore, increasingly become a site of political
struggle. In other words, it is serving as a surface of inscription upon which individual group complaints and demands become inscribed.

Numerous genealogical and deconstructive studies conducted by feminist, critical race, and sexual minority legal scholars have shown how the family has historically been rigidly designated as the pillar of society, comprising a middle class, single race, heterosexual unit with the woman as primary caregiver.\textsuperscript{18} This, of course, has significant implications because many state (and private) benefits are dispensed on the condition that family ‘criteria’ are satisfied.

The dislocation has been particularly acute in the case of lesbian and gay persons wishing to adopt (or retain custody of) children as couples or single parents. Child custody law, therefore, has proved to be a particularly useful window into the shifting discourse surrounding the family.

How exactly is the logic of the signifier operating here? In a first approach, we can see how the family has, for a remarkably long period of time, forgotten its political (and thus contingent) origins and presented itself as a natural and unquestionable fact of life. The reaction to its suddenly being put into question is to point to a list of characteristics which are meant to capture the ‘essence’ of family. But, as we saw in chapter one, the ‘essence’ (the objet petit a) always escapes the frantic attempts to pin it down in an exhaustive enumeration of defining features. There is a constant and constitutive overflowing.

Nevertheless, there is a concerted effort to arrest this slippage of the signified under the signifier of ‘family’. Oppositional logic is enlisted to help defend this consecrated institution. Drawing from such discourses as psychiatry, biology, religion, and political morality, sexual minority and mixed-race parenting are invoked to raise the spectres of impending threat, fear, and death. The very questioning of the sanctity of the family becomes synonymous with the disintegration of civilization. Tampering with the family is seen as pure evil and a potential return to the state of nature. Conservatives are
most reactionary: women who seek to adopt children without experiencing the 'proper' sexual relationship have obvious psychological problems; 'virgin' mothers are selfish because they are childless by choice and are prepared to 'steal' medical (insemination) and institutional (adoptive) resources away from those women who really need (and deserve) them; lesbians and gays must have dubious reasons for wanting children; children of 'virgins' will develop a jaundiced view of sexual relationships; gays are a repository of all sorts of diseases, such as AIDS, which threaten the very fabric of society; gays and lesbians are promiscuous and engage in unnatural acts, and aggressively proselytize the innocent. The liberals, for their part, adopting the immutability theory (in contrast to the conservatives' 'choice/social construction' theory) seem to implicitly endorse the hierarchy between heterosexuality and minority sexuality by accepting them as potentially legitimate members of a family so long as they do not flaunt their homosexuality. And, the oppressed, in their turn, see the family in its present incarnation as an obstacle to the full realization of their identity as human beings.

What we have here, therefore, is a clear case of the birth of an antagonism and a clear illustration of the process of identification. Defenders of the heterosexual ideal not only view the family as possessing a list of positive properties. They also construe any attempt to question those properties as an anti-social threat. Any attempt to affirm an alternative family as 'good' will be seen as a threat and will serve as a means to consolidate the conservative identity.

However, as we already noted, there is always an inevitable slippage. Mixed-race adoptive parents, for instance, is more or less acceptable as a legitimate component of today's family. This has been done by focusing on the similarities between 'traditional' families and potentially 'new' families, i.e., by establishing a (subversive) equivalential link. Further demands by sexual minorities are introducing an even further expansion of the meaning of the family. It becomes obvious that the family has become a site of political struggle. In other words, 'family' now operates as the signifier for an ideal
Chapter Two: Doing Theory

society riddled of oppression and all threats to its well-being. The myth of a better society serves as a surface of inscription for competing demands.

But how exactly, has this become possible? The idea is that the demands, originating from more and more quarters of the population, establish equivalent links with the signifier 'family' by repeated association with it. It has thus gradually been emptied of the particular content with which it was originally associated and has become the focal signifier designating opposition to the status quo. The political character of the family has thus become visible, and the question then becomes whether the courts are best suited to supervise the hegemonic struggle between its different possible conceptions. Of course, it goes without saying that the dual role played by the signifier 'family' (i.e., its role as designating the 'filling function' and its role as bearer of a particular content) is made possible on account of its originary constitutive split.

And need we point out how the rights discourse has been instrumental in giving voice to the demands of the oppressed and how it has provided the resources for subversive equivalent links (albeit without any guarantees)? But more of this later. Now, we will turn to consider the highly volatile debate on postmodernism.
Chapter Two: Doing Theory

Postmodernism as the Limit of Modernism: Variations on a Theme

Even a brief perusal of the literature centering about the postmodern debates leaves one with the impression that advocates on either side of the fence are, more often than not, arguing cross-purposes without engaging each other in a meaningful manner. This section is a first attempt at clarifying the issues so as to establish the terrain for a more fruitful dialogue. In doing so, we have chosen to concentrate on several themes which are often evoked in this area of contestation: Onto-epistemology; Fixity versus Nihilism; Power, Resistance, and Structural Constraint; the (im)possibility of Justice; and Discourse, Ideology, and False-Consciousness.

On the Onto-epistemological Issue

Here, we might recall our discussion in chapter one of the materialist-poststructuralist debate. How else might we approach the issue? We could, perhaps, begin by remarking that postmodernism (or postmarxism) arises as a result of trying to think the limits of modernism (traditional marxism). Though postmodernism's beginnings may be traced to a mutation in the discourse of aesthetics, it has gradually spread into ever-new areas, steadily becoming the new horizon of our political and cultural existence. (PLM, 63)

This new postmodern sensibility is characterized by an awareness of the precarious and contingent nature of identification; that things could very well have been otherwise. In short, postmodernism announces the historicity of being. And what exactly has made this new ethos possible? What historical account can we give to explain the emergence of this new mood? The answer has already been suggested by Fredric Jameson: the cultural logic of late capitalism.19 In other words, the very rapid, indeed crescendoing, pace of developmental change (based on wage labour), combined with the
unevenness of the social, has made visible the process of definitional negotiation as opposed to definitional discovery. Rapid change has thus been the cause of a growing number of dislocations, antagonisms, and accompanying empty signifiers. Think, for instance, of the creation of new sites of struggle such as the ‘family’, ‘rape’, ‘pornography’, ‘gay bashing’, and the ‘precautionary principle’. It is these sites that have served as just some of the rallying points for the new social movements. And it is the exposure of the social-in-the-making that has forced a rethinking of modernism.

But let us be clear: what we have in mind here, is not the abandonment of modernist values such as reason, autonomy, freedom of thought, etc. Rather, it is the ontological status of these values that is being interrogated. It is submitted that the conflation of these two positions, namely the political choice of values and the ontological status of these values, has created much of the confusion in the contemporary postmodern debate. Let us take, for example, Christopher Norris who enlists Norman Geras in his tirade against postmarxists such as Ernesto Laclau and Chantal Mouffe.

Norris’ essay ‘Getting at Truth’ provides a clear example of the kind of literature that attempts to pass as academically productive and engaging; that tries to advance the debate in a meaningful way. However, this is exactly what it does not do. Instead, what we get is an unmistakable air of superiority and smugness manifested in a persistent unwillingness to engage with issues raised by Laclau and Mouffe. Unfortunately, pretences of engagement (by means of occasional references to other peoples’ work (Geras) about still other peoples’ work (Laclau and Mouffe)) do not constitute sufficient grounds for off-hand dismissals. Frustrated at not being able to dig his teeth into a meaty issue, Norris finds an unfortunate outlet: lashing out at postmarxists, the harbingers of nihilism and mayhem. His lack of thorough engagement with Laclau and Mouffe is evidenced by his heavy reliance on Geras. However, he does occasionally attempt a more direct portrayal of their project. It is here that glaring
inaccuracies blind the reader. And no amount of erudition and deployment of theoretical artillery will cover up this gaping deficiency.

In a bid to illustrate our point let us present a few pairs of juxtaposed extracts and let them speak for themselves:

**Dismissive Accusation I:**

Laclau and Mouffe can go as far as to argue that there is *simply no relation* between class or gender as conceived in 'traditional' (ie., Marxist or feminist) terms and the range of strategies that is now opened up for a 'democratic socialism' happily disabused of such 'essentialist ideas and willing to take its chance with one or other of the discourses on offer'.  

**Antecedent reply I:**

To what extent do social classes exist nowadays? It would certainly be false to say that they have entirely disappeared. If one thinks of the workers in a mining enclave, for example, it is evident that the category of class may to a large extent be useful in characterizing them, since one finds a fundamental continuity and stability between all their subject positions. And the same could be said for a variety of other sectors. But if one thinks of the generalization of the phenomena of combined and uneven development in contemporary society, of the rapid rate of technological transformation and of the increasing commodification which takes place in late capitalism, it is clear that the prevailing tendencies lead to the decline of 'classes' as a form of constituting collective identities. This could also be reformulated in the following terms: there is a decline of the social -- as a set of sedimented objectivities -- and an expansion of the field of the political. (LTA, 165-166)

**Dismissive Accusation II:**

[Laclau and Mouffe] show little grasp of their disabling political consequences.

**Antecedent reply II:**

This lack of closure modifies the nature and importance of political argument in two important senses. In the first place, if an ultimate ground is posited, political argument would consist in discovering the action of a reality external to the argument itself. If, however, there is no ultimate ground, political argument increases in importance because, through the conviction that it can contribute, it itself constructs, to a certain extent, the social reality. Society can then be understood as a vast argumentative texture through which people construct their own reality.

.... Abandonment of the myth of foundations does not lead to nihilism, just as uncertainty as to how an enemy will attack does not lead
to passivity. It leads, rather, to a proliferation of discursive interventions and arguments that are necessary, because there is no extradiscursive reality that discourse might simply reflect. (PLM, 78-79)

And more recently:

Many rationalists will certainly accuse such a political philosophy of opening the way to ‘relativism’ and ‘nihilism’ and thus jeopardizing democracy. But the opposite is true because... the recognition that they do not have an ultimate foundation creates a more favourable terrain for their defence [i.e., because it is not given in advance and thus must be argued for and justified -- LJG]. When we realize that, far from being the necessary result of a moral evolution of mankind, liberal democracy is an ensemble of contingent practices, we can understand that it is a conquest that needs to be protected as well as deepened. (RP, 145)

**Dismissive Accusation III:**

Theorists like Laclau and Mouffe... can argue that ‘reality’ is entirely a construct of linguistic, discursive or textual representation.23

**Antecedent reply III:**

[T]he concept of discourse is not linguistic but prior to the distinction between the linguistic and the extralinguistic.... Because every social action has a meaning, it is constituted in the form of discursive sequences that articulate linguistic and extralinguistic elements." (PLM, 71) "[T]he distinction between linguistic and non-linguistic elements does not overlap with the distinction between ‘meaningful’ and ‘not meaningful’, since the former is a secondary distinction that takes place within meaningful totalities." (PWA, 83) "The entire development of contemporary epistemology has established that there is no fact that allows its meaning to be read transparently." (PWA, 84) "[A]s a member of a certain community, I will never encounter the object in its naked existence -- such a notion is a mere abstraction; rather, that existence will always be given as articulated within discursive totalities. (PWA, 85)

Conflating the linguistic and the discursive, whose separation has been a major concern of postmarxist theorists like Laclau and Mouffe, surely evidences Norris’ egregious casuistry. And to add insult to injury, he calls on the services of Norman Geras whose work24 is a rejoinder to a Laclau and Mouffe article (PWA) the substance of which Norris clearly shows himself to be ignorant of.

In turning to Geras, however, and in trying to move beyond Norris’ hot but empty theoretical firepower, let us tackle more precisely the issue at hand, namely, how to grasp
the limits of modernism. In answering this question, we shall also see what makes possible for both Geras and Norris the transformation in status of 'postmodernism' from a "precious gift into a gift of shit (as Lacan put it in his Seminar XI)." (LA, 129) And let us do this by considering the frequently-maligned concept of 'utopia'.

Utopia, understood as a blueprint for an ideal society (TDS, 232) devoid of antagonism, constitutes the driving force behind political activity. The crucial issue, however, is how to distinguish between an essentialist utopia and an anti-essentialist utopia (anti-utopia). It is the irreducible ambiguity that accompanies any such attempt that permits the above-mentioned slippage. This slippage surfaces in the following passage by Geras:

Overtly denying that there is any being-as-such, any in-itself, in terms of which competing discourses might be adjudicated, they [Laclau and Mouffe] install somewhere out of sight a secret tribunal of truth, mysterious in its ways, which allows them to judge here: as ‘essentialist’, hence wrong about the nature of the world; as economist, thus unable to understand the reality of the social; as determinist, therefore misconstruing history’s actual openness etc.; which allows them to employ a language of external reference, of objectivity, of truth... which allows them that long, that tireless, that never-ending 'this is how it is' with which the relativist tells you why you cannot say 'this is how it is', thus sending knowledge and consistency to the devil.25

In a move reminiscent of ones made by Kate Soper, Diana Fuss, and other feminist writers,26 Geras has turned the self-declared anti-essentialist into an unwitting essentialist. Geras thereby touches the tip of a potentially fruitful question, but prefers to return to his now practiced scourge rhetoric. The question is how has this transformation been made possible? How has Geras managed to read a supposed anti-essentialist as an essentialist? In more simple terms, how can we distinguish between these two positions without throwing up our arms and declaring (somewhat unhelpfully) that ‘you know an (anti-)essentialist when you see one!’?
It is here that the issue of the limits of modernity emerge most forcefully. And we are suggesting that Lacan’s logic of the signifier, as developed by Jacques-Alain Miller, Slavoj Zizek, Ernesto Laclau, Joan Copjec, and others, present us with perhaps the most sophisticated theoretical apparatus to date to tackle this issue. Let us see how we might shed some light.

In a first approach, we could say that what differentiates utopia from anti-utopia is an implicit acknowledgment by the latter of the constitutive impossibility of the utopian dream; that antagonism is the condition of both its impossibility and possibility; that the social has limits. In this context, the elision that Geras effects could be stated thusly: (utopia) + (limits) = (anti-utopia) = (just another version of utopia). Now, what makes this line of reasoning plausible can be traced to an incomplete comprehension of the subtle nuances of the logic of the signifier. The problem lies in the ambiguity evoked by the split of the signifier; or, in Joseph Campbell’s terms, by the difference between denotation and connotation.

We therefore realize that we are dealing with nothing less than the limits of language. We know, from Saussure, that each signifier’s signified consists in its bundle of differences from other signifiers. So, we might attempt to introduce a new signifier to denote the limit of the social. But a problem immediately arises: since this new signifier derives its meaning from its opposition to all other signifiers within the social system, it is an internal moment of the latter, thereby disqualifying itself as limit. For a legitimate limit must be radically external. (WES, 168-169) And this is true for each and every signifier. So, how to overcome this theoretical dead-end?

If we accept that what is internal to the social is meaningful, that which is external will be meaningless. In short, we need a signifier which has been emptied of its content; of its meaning; of its differential identity. In other words, we require an empty signifier. And since we have access only to signifiers within the current horizon of the social, we
are inescapably led the conclusion that each signifier is constitutively split. Not only does a signifier *denote*; it also *connotes*.

Perhaps we can now see why Geras is able to read anti-essentialism as essentialism: he moves entirely within the dimension of *denotation*; and like a two-dimensional creature well-set in its ways, he is insensitive to the subtle presence of an (external) third dimension. We are thus clearly dealing with asymmetry, not symmetry as Geras would have us believe. Anti-essentialism is not simply the symmetrical reverse of essentialism. Rather, it is its *negative supplement*. In a similar fashion, we could also say that postmarxism is the negative supplement of marxism; or that postmodernism the negative supplement of modernism. And this implies *not* a rejection of modernism, but rather the *separation* (in the Lacanian sense) of modernism from its essentialist ties. Indeed, it is the very modes of modernism (reason, critical thought, etc.) that have made such advances possible. And what’s more, it is the anti-essentialist epistemology that will ensure a more robust and secure support of modernist values and themes. The transition is subtle, but full of progressive potential.

Thus, the line separating a sublime limit from a pathological content is indeed fine. But it is *constitutive*. (It is responsible, as we noted before, for transforming ‘postmodernism’ from a sublime object to a disgusting protuberance; or vice versa.) In this sense, then, it is also a gaping and unbridgeable chasm: the Lacanian real. The corresponding anti-essentialist ethics would therefore suggest a full assumption of this split. It is simply not good enough to insist that Marxism’s view of the category of knowledge was never of an absolutist nature; that its contents are “always provisional” and “subject to revision in the light of new information” that they are therefore “open to ‘pluralist’ discussion and criticism;”27 when, with the same breath, one aspires to “cognitive objectivity” and an unwavering stance on the permanence and self-transparency of a category like ‘class’ or ‘natural phenomenon’; that categories exist which are the ‘true’ and, therefore, legitimate explanatory matrix in our historico-material
universe. This has already been clearly pointed out by Laclau and Mouffe. "Thus," they argue, Geras "says that to call an earthquake an expression of the wrath of God is 'superstition', whilst calling it a 'natural phenomenon' is to state 'what it is'. The problem is not, of course, that it does not make perfect sense in our culture to call certain beliefs 'superstitions'. But to counterpose 'superstitions' to 'what things are' implies: (1) that world views can no longer change (that is to say, that our forms of thought concerning the idea of 'the natural' cannot be shown in the future to be contradictory, insufficient, and therefore 'superstitious'); (2) that, in contrast to men and women in the past, we have today a direct and transparent access to things, which is not mediated by any theory." (PWA, 89-90, note 17)

So, in answer to our posed question, namely, how can we distinguish the essentialist utopia from the anti-essentialist anti-utopia we are forced to answer: with difficulty. But can we not say that, thanks to Lacan's logic of the signifier, we have advanced beyond the exasperated response 'you know it when you see it'? If we were to reply that the distinction is based not so much on what you say but on how you say it; and if we simultaneously recall our foregoing theoretical detour establishing the constitutive split of the signifier; could we not say that the distinction has been scaled up a notch or two in terms of focus?
Fixity versus Nihilism: Anatomy of a false dichotomy

As we have seen, the constitutive ambiguity subverting every identity makes theoretically unsound any attempt to establish, on an *a priori* basis, the definitive criteria for specific categories of thought. In the minds of many, however, the admission of this ultimate historicity of being is only the first step in a chain of events which leads inexorably to ultra-relativism and nihilism -- an admittedly sordid state of affairs in which judgment and justice have become all but impossible. In this section, we shall expose the false reasoning that such a position entails by showing how it is caught within the debilitating discourse of modernism; in other words, by showing how such conclusions can be drawn only by turning a blind eye to the limits of a modernist epistemology.

Discussion of this issue will inevitably trigger explorations into the hackneyed dichotomies of freedom/determinism, subject/structure, and the like. It will also evoke its sister issue: What are the implications for a progressive-programmatic politics? Though references to this latter issue will be inevitable, we hope to establish our present investigation primarily on a theoretical level, leaving the problem of strategy to a later chapter. Here, we intend to concentrate on the mechanics of identification and how, in the context of law, this might deepen our understanding of the nature of our sub-title's dichotomy.

Like so many other arguments centred around the postmodern debates, participants of most political persuasions proceed by locating themselves firmly on moderate grounds and dismissing (straw-man) counter-arguments as extreme. As was the case in the run-of-the-mill disputes among essentialists and anti-essentialists, this leads to little or no advance in our understanding. Almost no theoretician holds a position of unqualified relativism or unqualified determinism. So, to establish one’s theoretical stance as moderate solely on the reactionary recoil from either extreme is no more than an empty gesture. Rather, the crucial task is to define more precisely what makes possible
the distinction between the two poles in the first place; what, exactly, is meant by a ‘moderate’ position? And to do this, let us begin by reconsidering the process of identification.

As we may recall from chapter one, identification is driven by the constitutive lack of every subject. The important question is how this lack gets filled. In the absence of any hint of undecidability, the filler must already be predetermined. In this view, other signifiers which present themselves as available and, therefore, possible ‘filler candidates’ are superficial and unnecessary. They only serve to conceal the ‘true’ operation of the social. This would mean, in turn, that the original lack of the subject was also an illusion, for if its filler is determined in advance by a governing force, this lack would merely be an internal moment of the already constituted identity of this governing force. ‘Choice’ is thereby relegated to the realm of false-consciousness and is rendered impossible in a genuine fashion.

On the other hand, in the absence of any hint of determinism, the filler is not now drawn only from what signifiers are actually available. Rather, it is drawn from what is logically possible. Moreover, the lack of any determining force means there can be no criteria of choice. We are simultaneously confronted with an expansion of possibilities and a vanishing criteriology. We are again presented with the impossibility of choice.

We conclude, therefore, that the poles of our dichotomy are rendered identical in effect. Both lead to the absence of freedom inasmuch as the latter is characterized by a meaningful capacity to choose (and not, for instance, by a Spinozist consciousness of necessity). In engaging with the modernist modes of analysis we have come up against a clear impasse: an attempt to grasp each extreme ‘on its own’ without reference to its Other proves to be a meaningless exercise. Like a mobius strip, every identity is split into two incommensurable sides (local property) which are, nevertheless, united by the same surface (global property). Ernesto Laclau describes this equivalence of poles in terms of autonomy and determinism:
The notion of total determination and total autonomy are absolute equivalents. The concept of autonomy is only useful -- or rather, meaningful -- when neither of the two extremes (equivalents) is achieved. For if an external intervention is experienced as an interference in the development of a certain activity, we can indeed propose the need to autonomize that activity in terms of the intervention interfering in its development. The determination by the interfering force is clearly an external intervention in this case, since it is resisted by the person on whom it is practised. Without interference, then, autonomy does not exist. The degree of autonomy may vary, but the concept of total autonomy is devoid of all meaning. In this sense, autonomy will always be relative, since if one force has the power to interfere and the other the power to resist, the two will be partially effective and neither will manage to predominate exclusively. The field of relative autonomy is therefore a war of position in which neither of the two participant forces can achieve absolute victory. This once again confirms what our whole analysis has asserted: that the field of social identities is not one of full identities, but of their ultimate failure to be constituted. A realistic analysis of socio-political processes must therefore abandon the objectivist prejudice that social forces are something, and start from an examination of what they do not manage to be. (NR, 38)

We see, then, how postmodernism, in the guise of anti-essentialism, complicates our modernist picture. We can no longer begin from the assumption that identities are fully constituted. But, in so complicating matters, postmodernism opens up the space for the freedom so dear to the 'commonsensical' moderate position. The two poles of the opposition point to separate, though mutually dependent, antagonistic forces. Each relies on the other for meaningful existence, but at the same time is not fully determined by the other. And every identity is traversed by this antagonism which, as we have said, is constitutive.

This is why the category of contingency best characterizes antagonism. It harbours, within its midst, a constitutive tension. A relation between two elements is contingent inasmuch as each element's meaningful existence is dependent upon the other; and inasmuch as the particular Other is not necessary. Each identity is always inhabited by its constitutive outside. And it is this negative supplement that is the driving force of both its existence and its subversion. So we have the paradoxical result that an identity exists only insofar as it is blocked and can never be fully constituted.
Let us recap. Essentialism is characterized by an attempt to specify in advance, and in exhaustive detail, the identity of a person, object, or idea. Anti-essentialism shows the manner in which an identity’s existence relies on an excluded Other. (And as we have argued, this ‘showing’ can only take place within the modernist horizon but has the effect of pointing to that horizon – a pointing or ‘showing’ which is characteristic of the postmodern ethos.) Anti-essentialism exposes the relational (and contingent) character of all identity. Identity, in other words, cannot help but be relational, even though the specifics of relationality (and the excluded Other making such relationality and identity possible) cannot be specified in advance. It is in this sense that we can say that identity is rooted. Not in some specifiable essence (list of properties or features), but rather in its subversive Other. And we can now see why absolute relativism or nihilism as a criticism aimed at anti-essentialism misses its mark. It is only from an essentialist perspective that the threat of nihilism holds sway. If identity is to be found and defined in its immediate, inherent, and identifiable characteristics, a modification of those characteristics will imply eradication of that identity, no matter how minor the modification. And if each and every identity is subject to doubt and modification, we are inevitably left with total relativism and nihilism. (We should point out, too, that a frequent positivist variation on this theme consists in positing a totalizing essence but a core essence or meaning, the counterpart to which, in legal jurisprudence, takes the form of a penumbra/umbra distinction vis-a-vis legal rules. But this attempt does not resolve anything; it merely pushes the inquiry a further step back. In other words, it remains, at least theoretically, thoroughly essentialist.) By contrast, the anti-essentialist position holds that each and every identity always relies on a repressed Other (unconscious, constitutive outside, etc.). So, a modification of characteristics implies a shifting of identity, not its radical annihilation.
So far, we have exposed the traditional moderate who positions him/herself in reaction to one or other extremes to be standing on theoretically unsound ground. In other words, modernist moderates have not been able to specify directly (and fully assume) the ambiguous space they occupy because they are still wedded to an essentialist world-view. But, perhaps, we can further speculate as to where the appeal to a nihilistic threat owes its persuasiveness to. Can we not say, for instance, that unprecedented technological growth accompanied by staggering rates of social change might have something to do with it? There is, in other words, a mushrooming feeling of uncertainty as the openness of the social is revealed in all its nakedness. We are confronted with a very powerful desire for Order. What we have, in other words, is the emergence of the subject as lack in the form of an empty signifier. We have come ‘too close’ to the ‘truth’ of our being, our lack, and we immediately seek to distance ourselves from it again by filling it.

The danger arises when we are still caught in a modernist frame of mind whose point of reference is Truth and Reason, or in a premodernist frame of mind whose point of reference is Truth and God. Do we have to remind ourselves of the constant news coverage that suggests an unabating resurgence of nationalism, religious fundamentalism, racism, etc.? Far from indicating a regression to the past, this announces a possible future. And the logic of the signifier offers us a means to apprehend this ‘evolution’. That is why the epistemological common(non)sense of anti-essentialism needs to be theorized more precisely in terms of, let’s say, radical democracy. We need a theoretical grounding which will permit us to more fully assume our split and its accompanying anxiety. We might even risk the thesis that our historical epoch of late capitalism marks a transition in our society from a very recent history of tradition and order to, what in the domain of complex adaptive systems is referred to as, the ‘edge of chaos’ -- a state of maximum flexibility and adaptability. In this sense, we would suggest that the science of
complex adaptive systems possesses a panoply of theoretical concepts that are of direct relevance to social theory.

And a more sophisticated theoretical framework usually translates into a more fine-tuned practical outlook. The crudest practical form of such (anti-essentialist) theoretical ruminations, of course, is the election. What are elections if not an acknowledgment of the (democratic) empty place of power, of a sense of non-permanence, of interrogation, of possibility, of deferral? Now, perhaps, we can begin to understand the significance of such theoretical tools in developing this sensibility further. We need to deepen it and make it part of a political project of radical democracy so that we may increase our chances of foreclosing a resurgence of totalitarianism.

We see, also, why Laclau and Mouffe can claim that it is the failure of full identity consolidation that makes freedom and politics possible. For the complete realization of a substantive democracy erases its political-hegemonic origins by misrecognizing its substantive content for the form of fullness it aspires to. And is this not exactly the same motif represented by the subject-structure dichotomy? There is subject inasmuch as the structure fails to achieve full identity with itself. There is autonomy inasmuch as there is no determinative 'last instance'. Failure marks the emergence of the subject as lack and its accompanying anxiety for, and anticipation of, fullness. Successful identification implies the retroactive assumption of a subject position veiling the originary lack. And this entails a 'forgetting' of origins -- a 'forgetting' that comes in the form of a repression of the alternative historical trajectories that presented themselves as possible at the time of identification-decision.

And this brings us nicely to the topic of power relations....
On Power, Resistance, and Structural Constraint

Modernist discourse operates on the assumption that a discoverable causal nexus exists that animates the development of our social universe. We have already seen the debilitating consequences of such a determinist view. But we also saw how such a position is inhabited, and thus salvaged, by its negative supplement.

It is for this reason that Laclau can argue that Power, in the singular, does not exist. (MPI, PR) This is due to the presence of power's Other: Resistance. Each relies on the other for its existence. Each cannot fully determine the other; which means that only powers, in the plural, exist. Thus, it is a Power's failure to constitute itself as Power that creates the space necessary for the emergence of a surface onto which resistance (or a crisis of legitimacy) can be inscribed. Yet again, we find that conflict and antagonism are irreducible. Whereas power moves in the direction of reducing and concealing the number of possible historical trajectories, resistance moves in the direction of increasing and making visible the number of possible historical trajectories.

We can conclude, therefore, that inasmuch as power operates to constrain behaviour by reducing the number of available options, structural constraint has its extimate limits. The impasse in the debate framed by such considerations (ie., the debate that pits determinism against autonomy) could be diffused by a displacing question: To what extent does the pole of structural constraint dominate the social field at the expense of a potentially more open and political alternative? In other words, the crux of the impasse seems to reside in the extent to which there is openness of the social.

Let us try to be more specific. What often elicits the ire of structural marxists is the emphasis placed by postmarxists on the contingency with which historical events are linked and decisions made. If, they argue, contingency is indeed so pervasive why is it that change for the 'better' is slow (if at all) in coming? Why are so many patterns of oppression so visible and predictable? The postmarxist rejoinder, however, consists not
of denying these claims. On the contrary, such social critiques are fully assumed. Indeed, the apparent paradox is that such criticisms are made possible by acknowledging the constitutive contingency of every identity. It is precisely because specific identity formations are not necessary that a critique of the status quo is conceivable. In other words, an unwavering insistence on a historic-material determinism unwittingly precludes the utopia that traditional marxists so aspire to. Instead, we must fully theorize how it is possible to on the one hand acknowledge that social behaviour may be predictable and oppressive and, on the other, that it need not be so. So, the question becomes how to displace and dissolve oppressive structures from within an anti-essentialist frame of reference.29

Let us take the example of sexual abuse/harassment in the workplace, an example which will also permit us to link our seemingly abstract account of power (as antagonistic and repressive) to the more usual, but less well defined, notions of ‘power relation’ or ‘relation of domination/oppression’. The relevant question in this case is what makes possible the emergence of the category ‘sexual harassment’ in the context of (to be more specific) employer-employee relationships? We can attempt a rough answer as follows. First, one person (the employee) is subject to the decisions of another person (the employer). Second, the employer is sexually attracted to the employee, and sexual advances are made. Third, the sexual advances made by the employer begin to be seen as inappropriate, offensive, even threatening by the employee.

Now, it is important to realize that, though these moments may together constitute a threshold test in female sexual harassment claims made against males, they are not linked to each other in any essential way. In other words, having authority over someone does not necessarily lead to sexual attraction which does not necessarily lead to sexual advances which does not necessarily lead to an uncompromising insistence. However, a series of historical events and ideologies, whose contingent roots have been erased, have ‘conspired’ to make sexual harassment cases more numerous.
First, we had (and often still have) a particular family ideology which stresses the importance of the man’s role as provider. (This ideology plays out in very many ways and is often linked to other institutional ideologies such as the Church. Some stereotypical factors militating against women who do apply for jobs include: too emotional, easily distracted, pregnancy/child liabilities, etc.) It is not surprising that the overwhelming majority of positions of authority are occupied by men. Second, we have a whole semiotics of sexual arousal fed by mass media, pornography, personal experimentation, and so on, which fix the parameters of what constitutes sexiness. Third, we have a particular male ideology which fosters the belief that men have a virtual right to sexual gratification; that sexual prowess is a sign of virility and a badge of pride; that women really do want sex, even if they seem to be protesting. In addition we have a public discourse of sexual equality which relegates issues of sexual morality to the private sphere.

Thus, we see that the contingent coincidence of these moments at a particular historical juncture make possible, for example, the phenomenon of sexual quid pro quo. We see that power, in the sense we have been using it, does not necessarily comprise acts of physical abuse per se. Rather, it derives from the repression of the other possible options for action that presented themselves prior to the master’s act of decision-making (as in hiring or firing), i.e., at the moment the discourse found itself in the hysterical mode. Progressive critique, therefore, could proceed by uncovering the contingency of a series of such acts, and by presenting an alternative set of options.

To return to our example, one of the standard progressive strategies consists in simultaneously exposing the series of events which culminate in males dominating the job market and promoting, say, an affirmative action plan to encourage female entry into the workforce, especially in management positions. Alternatively, or in addition, we could, as Duncan Kennedy does, attempt to dissolve the perceived necessary link between sexual arousal and sexual gratification; in other words, to foster an attitude whereby, for
example, sexy dressing is seen as an end in itself. Men would then, so the logic goes, have an erotic interest in refraining from sexual abuse by allowing women (with men’s input) to experiment with dress.

What such strategies have in common, then, is the attempt to loosen the seemingly necessary ties between several sequential moments by exposing their contingent articulation. But, here, we must issue a caveat. For mere recognition/acknowledgment of the historicity of being does not necessarily result in change. We must remember that the elements present in the contingent articulation themselves each stand for, or abbreviate, a whole array of contingent-turned-necessary constellations. This, by the way, also applies to the creation of ‘interests’: vested interests emerge as a result of a long and tortuous history whose contingent traces are erased by social sedimentation. And the deeper these roots go, the more the deconstructive work that needs to be done, and the longer it will take before it enters our consciousness so as to facilitate change.

Sensitivity to the mechanics of such a transition (ie., from the sedimentation of the social to the openness of the political) puts us in a position to critique liberals such as Camille Paglia who, in the wake of the Hill-Thomas affair, for instance, suggests that women who are subject to sexual harassment should merely ‘pick themselves up and leave’; and Alan Dershowitz who suggests that the battered women syndrome is an injustice perpetrated on behalf of women who are stupid enough not to leave their husbands. These liberals are typical of a breed of intellectuals who subscribe to a radical (a)historicism (as opposed to historicity) in which synchronicity (meant to connote spatiality) completely overpowers diachronicity (meant to connote temporality). They also assume an a priori fully constituted identity which simply needs the will power to access the strength necessary to leave an inhospitable situation or take a case to court. But this, again, is symptomatic of current liberal historical amnesia.

To avoid such pitfalls, it is necessary to appreciate the very material weight of history, ie., the still considerably heavy social sediment. Progressive reforms must,
therefore, be sensitive to what we could call their ‘depth reach’. The deeper into the social sediment reforms reach, the greater the potential dislocatory effects. We could mention at least two factors that should be taken into account under these circumstances. The first is that the presence of, say, equality reforms may have the unintended effect of concealing the by definition uneven character of the social. And here we can discern the roots of the traditional marxist social critique. The second is the potential of a backlash stemming from the sedimented interests that such reforms attempt to disrupt. It is here, perhaps, that we can appreciate Hegel’s dictum concerning the ‘silent weaving of the Spirit’. In other words, he suggests working hard at the ‘edges’ of interests; working diligently to disrupt seemingly far-removed assumptions and presumptions underpinning an interest; then, when all is changed but the name, to formally issue the performative. (EP, 66-66)

Now, the increased pace of social change will not only create multiple dislocations but will also make visible the radical historicity of being and will open up new political spaces where none existed before. New possibilities will emerge and historical trajectories will be more fluid. We can now, perhaps, see what Laclau has in mind when he suggests that

the more dislocated a structure is, the more the field of decisions not determined by it will expand. The recompositions and rearticulations will thus operate at increasingly deeper structural levels thereby leading to an increase in the role of the ‘subject’ and to history becoming less and less repetitive. (NR, 39-40)

And what we must keep in mind at all times is that the undertaking of progressive strategies must not lead us to believe that we act as fully constituted agents upon, and without being modified by, a partially constituted society in an attempt to suture it.

Let us now draw this section to an end by tying our dislocatory comments to our notion of power as repression. As a start, we must acknowledge that the space for change
does not emerge from a fully constituted will residing in the agent and exerting pressure on society. But neither does it emerge through a fully constituted society exerting pressure on an agent. Rather, change becomes possible only with the failure of identity-constitution. As such, the subject-as-will is always evanescent; it always was or always will have been. In other words, change only becomes conceivable when the structure, of which the agent and society are two moments, is dislocated. The incidence of an external discourse supporting a right to be free from harassment upon a relation of subordination converts this into an antagonistic site of oppression. It is the realization that things could be otherwise (and better to boot) that accounts for the transformation of this relation and opens the space for critique. In short, we have the emergence of the subject as lack—a lack which wishes to be appeased by a signifier other than the one so overwhelmingly on offer and which we now read as, for example, 'submissive female'.

Thus, we could say that the power inherent in the suppression of alternative identities is exposed and another little bit of the social sediment becomes politicized. We have the social equivalent of what Lacan calls the return of the repressed: each historical juncture is based upon a repression of alternative trajectories. And, as all identity is ultimately unstable, precarious, and subject to subversion, there will always come a time when the real (ie., the radical unaccountability-contingency of a relation) will erupt.
On the (im)possibility of Justice

Let us now consider the vexing jurisprudential question as it is traditionally posed: Does the judge discover the law, or does s/he make it? Intuition tells us that it is neither one nor the other but, somehow, both. The problem arises when an attempt is made to give a more complete theoretical account of this paradoxical relation.

Let us begin by noting that, as has been shown by Stanley Fish, the legal liberal Ronald Dworkin, not unlike H. L. A. Hart, relies on the notion of a core textual meaning that constrains the interpretive activity, allowing creativity to play itself out only at the edges, the ‘penumbra’. And this despite Dworkin’s explicit efforts to displace constraint from text to practice. For Fish would readily accept Dworkin’s explicit approach, if only he were to follow through with it.

As is his common practice, Fish has recourse to an interpretive community, itself historically contingent, as the sole constraining mechanism in the interpretation game. Thus, as Leonard Kaplan points out, “Fish responds that even the most radical judge, right or left, is constrained not so much by the text but by what the practice of judging has come to mean.” In this view, Dworkin’s appeal to a ‘core’ meaning merely highlights the vestiges of an outmoded essentialism that have yet to be shed.

Can we not see the relevance of the debate between the structural marxists and postmarxists to this legal issue? On the one hand, Dworkin, recognizing the evident presence of constraint, attempts to track down its source. Though he explicitly places it on the shoulders of judicial practice, the irreducible negative supplement causes his own scholarship to self-deconstruct, exposing an alternative source: the text. On the other hand, Fish argues for the ultimate historicity of all being, including the interpretive community which purports to ground the text.

It seems that it is this last step that Dworkin is unwilling to take. And this explains the inevitable ‘revenge of the supplement’. By denying the contingency of the
judicial practice itself, Dworkin is forced to regress back into a search mode whose aim is to uncover an ultimate ground, a settled shared meaning. Hence Fish's claim that Dworkin is a positivist.

Now, how exactly can psychoanalytic theory, via the logic of the signifier and the mechanics of identification, help us better comprehend the false dichotomy between discovering and making law? Let us begin with discovery. Here, the presupposition is that the item to be discovered is already fully constituted as an identity, and that the discovery process itself leaves it undisturbed. Likewise, in the case of making the law, the presupposition is that the maker is fully constituted as an identity (i.e., has a fully-formed idea of what is to be created) and is unaffected by the process of creation.

If we recall, however, that every identity is constitutively split, traversed by antagonism, the distinction between discovery and willful creation becomes problematic. We immediately see the relevance of our earlier discussion on the false dichotomy determinism/nihilism. Both poles have spatial-structural extent and completely miss the dimension of the temporal-subject.

So, what exactly happens when a judge makes a decision? How can we conceive of her role? We could say it comprises an attempt to settle a dispute between two parties, to intervene in a relation which has become antagonistic in the strict sense of the term. The aggrieved party (feminist, sexual minority, environmentalist, tenant, ethnic minority, etc.) brings a case before the court because a perceived injustice has been perpetrated by the accused party (patriarch, heterosexist, logging company, landlord, racist, etc.). The judge, therefore, just like the place of power at the moment of a political election, is empty. S/he serves as a surface of inscription onto which demands and counterdemands are inscribed and fight for hegemony. The act of decision-making hegemonizes one demand at the expense of others. The decision necessarily represses an alternative set of possible outcomes whose actualization would inevitably have led to a different historical
trajectory. Thus, for example, a heterosexist conception of the family might achieve hegemony over other possible conceptions, with all the consequences that entails.

The difference between a judicial decision and a political election, however, is that the former, unlike the latter, must be backed by clearly articulated and documented reasons. It is here that the Dworkin/Fish debate becomes relevant, for the issue is how far does the principle of stare decisis (at least in common law jurisdictions) go in curtailing unfettered judicial activism? Or, to put it differently, how does the doctrine of precedent make an outcome more predictable than, say, a decision based on a stochastic electoral process?

To explain this difference, we must return to a previous discussion in which we implied the Husserlian distinction between sedimentation and reactivation. The sedimented nature of the social refers to the unquestioned and natural aspect of our quotidian practices. In other words, it refers to those activities whose status as hegemonic has not been pointed out and can therefore not even be conceived as such. Such activities are strictly habitual: we do them because we've always been doing them; because it belongs to tradition; because 'that's the way things are'. Reactivation, on the other hand, refers to the act of putting into question; of exposing the contingent nature of a sedimented social formation; of saying 'things could be otherwise'; of exposing the political in the social, the contingent in the necessary. (And can we not, here, see how the sedimentation/activation opposition closely and insightfully corresponds to the traditionally dichotomized opposition of fact/value?)

We can see, therefore, that what is responsible for sedimentation (ie., the erasure of the political character) is repetition. Now we can appreciate the relevance of the citational practice of the judiciary, which we alluded to in the first chapter. The function of the doctrine of precedent is nothing short of the repeated veiling of the political. This explains why common law reform has historically been, at best, incremental. It has also been responsible for a good deal of the mystique of law; that reason and rationality could
deliver an indisputably correct decision (let us recall Dworkin's Hercules); that the judge's role was to discover the true workings of the law and objectively deliver an inevitable outcome.

But, alas, things are not so simple any more. Rapid social change spurred on by burgeoning new knowledges and diminishing geographical distances has been responsible for the pent-up tension between new-found mores and old-style conventions. It has brought into high relief the political nature of the judicial process. And it is no surprise that the Legal Realists and their heirs, the Critical Legal Scholars, whose task it was precisely to uncover such politicking, should have emerged just as the fast-paced iterative logic of late capitalism was tightening its grip on developed societies. We could even say that the judicial penchant for precise legal logic made such a task easier. This is because, among other reasons, judgments sharpened to a point their inevitable inconsistencies and circularity, especially when accompanied by dissenting decisions which claimed the same 'objective' laws as their source of reasoning.

Though many die-hards still defy such trends by staunchly defending the sanctity of the Law, cracks are becoming too wide for even the most sophisticated cover-up job. Social science data, for instance, are gaining increasing legitimacy as constitutive of legal reasoning. Structural constraint through citational practice is further threatened by a growing number of increasingly antagonistic, split decisions. All these factors translate into a gradual erosion of faith in our judicial system's ability to transparently access and justify legal decisions. Explicit references to past practices in an effort to ground our reasoning will no longer hold water when such sedimented activities are themselves being reactivated and struggled over. Think, for instance, of the attempt to justify rape by pointing to provocative dress codes; or of imputing consent in the lack of physical resistance shown by the victim. Each attempt to 'pass the buck' for the purposes of grounding a decision fails because the 'natural' meaning of these social practices
(provocation, lack of resistance) are abbreviations of other sedimented discourses/ideologies which are themselves being contested.

Thus, together with an increasing rate of social change, we see that the 'depth reach' can only extend to even deeper levels of social sediment, thereby making legal decision-making (and history) less predictable. Law is being stripped of its judicially metaphysical dress to reveal raw politics. In short, late capitalism has unwittingly announced what can now only be considered obvious: Law’s Empire has no clothes.

We can now see why justice, just like the democratic ideal, is impossible. It’s full realization is synonymous with its dissolution. Why? Because justice implies criteria of judgment. But justice also implies absence of bias, which is just another name for criteria of judgment. We are thus led to accept the existence of an irresolvable paradox: justice is possible so long as its final realization is radically impossible. In other words, its impossibility is its condition of possibility. And here lies, as Derrida points out, the scandal of the expression ‘enforceability of law’, for it implies a source which can be either just or unjust in its application of the law. What we have learnt, however, is that law can only be tautologically grounded: law is just because it is the law. And any attempt to definitively ground it in distinct reasons simply conceals the violent and radical exclusion of alternative reasons.

But what are the implications for critique? If justice is simultaneously possible and impossible how can we aspire to make any claim about anything? The answer issues forth once we abandon the hope for a transcendent logic which can guarantee our reasoning. Instead, we must fully assume political reasoning as the only defensible (but not guaranteed) approach to legal decision-making. Law, in other words, constitutes but another political forum in which the logic of the signifier is played out to the fullest. In this view, distinctions between status and conduct, authorial intent and textual meaning, hard cases and easy cases are subsumed under different political strategies which
establish precarious chains of equivalences in favour of one or another outcome. The
drawing of lines and the creation of distinctions, therefore, is always a political act and
will always be subject to challenge and redefinition.

Now, in order to interrogate more closely the nature of political argument and
how that relates to a perceived unjust social landscape we will devote the following short
section to an examination of ideology and false-consciousness.

On Discourse, Ideology, and False-Consciousness

We can make relevant our discussion on structural constraint and justice to the vexing issue of false-consciousness through the question: Does there remain any legitimate use for this latter category?

False-consciousness, as traditionally understood, relies on some notion of structural constraint. This is because it is premised upon an observed pattern of behaviour -- a shared set of beliefs leading to a predictable set of (undesirable) practices. These beliefs, then, are presented in contraposition to another set of descriptions which are offered as the truly genuine and accurate account of how the world operates. The accurate description, therefore, is meant to expose the false-consciousness (false belief) that has been reified into a set of social practices. Thus, for example, property is falsely treated as a thing-in-itself instead of treating it as an abbreviation of a specific relation between persons. Or rights are treated as empowering an individual or group when, ‘actually’, they alienate them. Or, pornography is used by women and men as sexually liberating when, ‘in fact’, it co-opts them into a male dominating patriarchy.

We immediately see the problem with this kind of maneuver. In asserting the ‘true’ state of affairs, there is an appeal to an external reality which is transparently accessible to a chosen few. It makes as much sense to declare one’s certainty as to a discovered Truth as it does to establish once and for all the meaning of the shark in
Spielberg’s *Jaws*. Does it signify the ultimate symptom of capitalism: exploitation? Is it the harbinger of nature’s revenge on civilization’s untamed development? And so on. (TN, 149) Such metaphysics has been the deconstructive stuff that Derrida thrives on. But, more importantly, the danger with such appeals lies in the very real totalitarian temptation -- a state of affairs that permits no discussion and no dissent. Let us not forget Stalin, Mao Tse-Tung, MacArthur.

So, how can we reconceive false-consciousness so that it may remain analytically (and democratically) useful? Let us, for a moment, recall our discussion surrounding the sedimented domain of the social and the reactivated domain of the political. What constitutes the former are a predictable set of practices brought about by the unthinking (unquestioned) repetition of specific sequences. In order to effect change, therefore, we must first expose the contingently connected steps of such sequences which have only retroactively, and through repetition, been converted into necessity. Offering alternative sequences provides a way to make visible this contingency. Offering alternative sequences as the way things ‘really are’, however, achieves at least two things. First, it propagates the myth of the ‘neutral’, ‘objective laws of history’ by keeping the political character of social relations concealed: all we need to do is ‘open our eyes and see things for what they really are!’. Instead of looking at such ‘uncovering’ as a process by which we gain access to a revealed Truth, we must consider it as an uncovering of a truth -- a truth, however, which we are willing to fight for.

If social relations are contingent, it means that they can be radically transformed through struggle, instead of that transformation being conceived as a self-transformation of an objective nature; if power is ineradicable, it is because there is radical liberty that is not fettered by any essence; and if opaqueness is constitutive of the social, it is precisely this which makes access to the truth conceived as an unveiling (*aletheia*) possible. (NR, 35-36)

Second, the antagonism thus erupted is made brittle because only one option (rather than a plurality of options) is offered as an alternative. A psychoanalytic ‘crossing of the
fantasy' would involve exposing this contingency-turned-necessity. A full assumption of the antagonism, in its ultimate meaninglessness, widens the horizon of possible interpretive principles. The point is to transform the unthought, unproblematized social practice into a political site; to institutionalize the emergent antagonism by creating conditions for the hegemonic struggle of competing political positions.

So, does ideological false-consciousness survive as part of our critical panoply? From an anti-essentialist perspective, and in reference to its traditional usage, the answer must be negative. However, again from the postmodern perspective, the notion of false-consciousness may still have a role to play if reconceived as a practice of giving way to one's desire; of giving way to the totalitarian temptation; of veiling the split of the signifier; of succumbing to the will to totality; of misperceiving S1 and the objet petit a as fused; in short, of striving for closure once and for all. At the same time, however, we must recognize that, as part of our 'will to critique', the elimination of ideology is both impossible and undesirable; for without it, even a partially constituted Society would be inconceivable. We shall conclude with Laclau's rendition of the new roles for ideology and false-consciousness as members of the critical tool-bag.

The critique of the 'naturalization of meaning' and of the 'essentialization of the social' is a critique of the misrecognition of their true character. Without this premise, any deconstruction would be meaningless. So, it looks as if we can maintain the concept of ideology and the category of misrecognition only by inverting their traditional content. The ideological would not consist of the misrecognition of a positive essence, but exactly the opposite: it would consist of the non-recognition of the precarious character of any positivity, of the impossibility of any ultimate suture. The ideological would consist of those discursive forms through which a society tries to institute itself as such on the basis of closure, of the fixation of meaning, of the non-recognition of the infinite play of differences. The ideological would be the will to 'totality' of any totalizing discourse. And insofar as the social is impossible without some fixation of meaning, without the discourse of closure, the ideological must be seen as constitutive of the social. The social only exists as the vain attempt to institute that impossible object: society. (IS, 27)
1. We can see, here, why the objet petit a is impossible to pin down, even in theory. Sometimes it evokes the order of the real by forever eluding the grasp of symbolic–imaginary attempts to pin it down as essence. Sometimes it evokes the order of the imaginary as the filler which promises to satisfy the demands of a fully-sutured identity. Sometimes it evokes the symbolic Other inasmuch as it points to a particular content–meaning derived from the system of signification, $S_2$. And sometimes it again evokes the order of the real inasmuch as it represents the real Other which is often perceived as the impediment to full identity.


3. Ibid. at 10.


5. In Lacanian mathemes:

\[
\begin{align*}
S_2 & \rightarrow \alpha \\
S_1 & \rightarrow S
\end{align*}
\]

6. In Lacanian mathemes:

\[
\begin{align*}
\alpha & \rightarrow S \\
S_2 & \rightarrow S_1
\end{align*}
\]

7. In Lacanian mathemes:

\[
\begin{align*}
S & \rightarrow S_1 \\
S_2 & \rightarrow S_2
\end{align*}
\]

8. In Lacanian mathemes:

\[
\begin{align*}
S_1 & \rightarrow S \\
S & \rightarrow \alpha
\end{align*}
\]

9. See also Miller, Jacques-Alain, ‘Suture (elements of the logic of the signifier)’ (1977/78) 18(4) Screen 24; EP, 42-50; and MPI, 31-35.


11. “Scourge rhetors deploy moral (Biblical), medical (plague/sickness), and other debasing (vermin) images to assert the intrinsic evil of lesbians and gays”: Jacobs, *ibid.* at 729.

12. (1986) 478 U.S. 186. “In a sharply divided five-to-four decision, the Court held that Georgia did not violate the constitutional privacy rights of gays by enacting a law that criminalized private, consensual homosexual sodomy”: Jacobs, *supra* at 737. Justices White and Burger likened homosexual sodomy to “adultery, incest, and other sexual crimes” (at 196) and justified the condemnation of homosexual conduct (which is what defines the homosexual in their view, and which disqualifies them as a legitimate group based on status) by referring to Georgia’s presumed disdain for sexual sodomy and to “Judeo-Christian moral and ethical standards” (at 96). Justice Blackmun, in his dissent, made the case for ‘groupness’ by referring to groundbreaking discrimination cases (such as *Brown v. Board of Education* (1954) 347 U.S. 483 holding racial segregation in public education to be unconstitutional, and *Loving v. Virginia* (1967) 388 U.S. 1 holding that a Virginia statute barring mixed race marriages was unconstitutional) and showing that Biblical sensibilities (such as an aversion to interracial marriage) have been subsequently declared immoral. Powell’s deciding opinion walks a fine line between recognizing gays and lesbians as a group on the one hand, and limiting their demands to a right to be free from actual harassment (the presence of unenforced anti-sodomy laws qualified only as potential harassment). The *Bowers* decision shows a very definite split between the public discourse of tolerance and the private discourse of disgust.

13. This was “a measure designed to protect lesbians and gays from housing and employment discrimination”: Jacobs, *supra* at 742-743. Here again we have a shift from the affirmation/scourge type of discourse to the victimage/tolerance type of discourse. Though the bill was eventually vetoed, it was debated primarily within the latter matrix. In other words, it was vetoed not because homosexuality connoted immoral conduct, but rather because, though homosexuality was a recognized characteristic of a group, already-existing anti-discrimination legislation was adequate.

Chapter Two: Doing Theory

that "[the Critical [Legal Studies] claim of legal indeterminacy may be understood as a declaration that
document can never be an adequate explanation of legal results."

Here, he considers the following three groups of cases:

Here, he considers the following three cases:
2) On firing policy: Rich v. Secretary of the Army (1984) 735 F.2d 1220 (10th Cir.)

Danielsen, supra at 1507-1508.

See, for example, Cooper, Davina, and Didi Herman, ‘Getting “The Family Right”: Legislating
Postmodernist Challenges to Feminist Analyses of Law, Family and State: Ideology and Discourse in

Jameson, Fredric, Postmodernism, or, the Cultural Logic of Late Capitalism (Durham: Duke University


Ibid. at 290.

Ibid. at 291.

Ibid. at 291.

Geras, Norman, Discourses of Extremity: Radical Ethics and post-Marxist Extravagances (London:

Ibid. at 163, as quoted in Norris, Christopher, The Truth About Postmodernism, supra at 292.

See, for example, RP, 87, and RP, 89, note 16.

Geras, Norman, Discourses of Extremity, supra at 162, as quoted in Norris, Christopher, The Truth About
Postmodernism, supra at 190.

Lefort, Claude, Democracy and Political Theory (Minneapolis: U. of Minnesota, 1988).

In order to visualize our problem more clearly, it might be analytically helpful to distinguish between two
not unrelated moments of the structural totality: structural constraints in the operation of agents; and
structural constraints in the operation of society itself. In order to illustrate the first instance, we might
calculate two subjects in identical ‘external’ circumstances. In making a decision, one subject considers
more factors than the other. (Of course, it is assumed that each individual’s historical trajectory up to the
moment of decision will have been structured differently.) In order to illustrate the second instance, we might
calculate two subjects with identical historical trajectories up to the moment of decision, but who
suddenly find themselves in different ‘external’ surroundings, one offering a greater selection of options to
consider than the other. The question then becomes whether we can come up with a useful explanatory
framework to account for these differences.

Kennedy, Duncan, ‘Sexual Abuse, Sexy Dressing and the Eroticization of Domination’ (1992) 26 New

Fish, Stanley, Doing What Comes Naturally: Change, Rhetoric, and the Practice in Literary and Legal

Kaplan, Leonard, ‘Without Foundation: Stanley Fish and the Legal Academy’ (1991) 16(3) Law and
Social Inquiry 593 at 601.

Review 919 at 925.
CHAPTER THREE: The Law and Politics of Rights and Identities

In this chapter we will describe the rights debate as it is often discussed in scholarly literature. The purpose of this account is to provide a backdrop against which our running (postmarxist) commentary and our subsequent sections (regarding a Lacanian contribution to the rights debate) can be read. And, because the rights discourse is resorted to by individuals and groups as an integral instrument in the representation of their interests and, therefore, in the construction of their identities, we shall also examine in more detail the significance of the political process of identification.

Rights Discourse: The Traditional Debate

The Critique of Rights

The critique of rights has often been associated with the CLS movement. However, because the CLS movement also comprises advocates of the rights discourse, we should, perhaps, identify more precisely the more critical strand. Thus, we could say that the most vocal opposition to, and denigration of, rights has come from a group of
Chapter Three: The Law and Politics of Rights and Identities

traditional marxists within the CLS group. We have in mind, here, such scholars as Colin Sumner, Judy Fudge, Harry Glasbeek, Ronald Weitzer, Jay Feinman, Peter Gabel, and others. And what do we mean by traditional marxism? We mean to refer to a particular stream of marxism which, in contradistinction to postmarxism, aspires to some form of foundationalist grounding, whether in the guise of instrumental determinism or structural determinism, with or without minor modifications of the ‘relative autonomy’ type.

We can briefly summarize the main criticisms. First, there is the argument that the state, normally taken to designate the public arena, in explicitly ascribing rights to everyone irrespective of distinctions based on race, sex, sexual orientation, etc., has made easier the logically illegitimate deduction to be made that equality in the public domain implies equality in the private domain, i.e., that de facto equality exists in a realm of de jure equality. Critics claim that substantive inequality has been made invisible on account of a pervasive formal equality. In this view, equality issues do not even have the opportunity to arise in the private realm. Of course, this critique, as does the liberal ideology the criticism is aimed at, presupposes a clearly delineated public realm uncontaminated by the private. We will argue that such a stark distinction is problematic from a postmodern perspective and accounts for an illegitimate elision on the critic’s part. Second, when issues of equality do become visible (i.e., pass into the public arena), their resolution is sought through an overwhelmingly formal, rather than contextualized approach. This has the effect of perpetuating formal equality at the expense of substantive equality. And finally, that rights themselves are indelibly marked with injustice. In this view, the very form of rights is synonymous with the form of inequity. Rights merely reproduce and deepen material inequalities because it is a direct product of the (unjust) capitalist mode of production. Thus, the debilitating forms of the capitalist mode of production, which cannot help but be expressed through the rights discourse, include individualism with its alienating tendencies, reified abstraction with its appeal to
a dubious neutrality and objectivity, and irreducible indeterminacy with all the
incapacitating implications this entails.

**Does Public State Neutrality Mean Invisibility of Private Inequalities?**

It was Marx who, in discussing the right to freedom of religion in the context of
ridding the state of a unique religious identity, pointed out that “[t]he limits of political
emancipation are seen at once in the fact that the state can free itself from a limitation
without man actually being free from it, in the fact that a state can be a free state without
men becoming free men.”¹ In a private, social landscape where imbalances (whether
based on property, religion, gender, race, sexual orientation, etc.) are absent, the
abolishing of such explicit state allegiances is certainly in accord with the principle of
liberty and equality, on both a formal and substantive level. However, in a landscape of
deep substantive inequalities, pretences of equality are just that: pretences.

In the context of the transition away from the ancien régime, and the state’s
pronouncement that the right to property will no longer officially and politically be
confined to the few and privileged but, rather, available to all, Marx went on:

> [T]he political annulment of private property not only does not abolish it
> but even presupposes it. The state abolishes distinctions of birth, rank,
> education, and occupation in its fashion when it declares them to be non-
> political distinctions.... Nevertheless the state permits private property,
> education, and occupation to act and manifest their particular nature as
> private property, education, and occupation in their own ways. Far from
> overcoming these factual distinctions, the state exists only by
> presupposing them.²

Similarly, in the feminist and race contexts, the state has divested itself of its
sexist³ and white supremacist forms by abolishing all explicit references to distinctions
based on such notions. Now, rights are no longer withheld on the basis of sex or race. The state, therefore, absolves itself of inequities rooted in race or gender propagated at non-state sites. It relegates responsibility for their ‘resolution’ to the socio-civil sphere, whose uneven terrain provides innumerable opportunities for the development of sites of oppression and antagonism.4

For example, collective agreements and union constitutions are held to be private and not subject to public scrutiny, despite evidence that such documents often result in large differences between wages received by men and women. “The emphasis is upon whether the impugned act can be identified with the formal attributes of governmental authority and not upon whether it has actually inhibited or damaged the interests of particular citizens.” So, “[b]ecause the courts have opted for a liberal approach to the scope of rights and freedoms guaranteed by the Charter, the coercion of privacy remains intact in the employment relation.”5

We can see, therefore, how a series of equivalential displacements linking state neutrality to the idea that ‘true’ freedom comes from keeping the state at bay, results in a negative conception of liberty, rather than a positive conception of equality. However, this is not to imply that the move to shed the state’s previously explicit biases is not to be welcomed. Indeed such formal recognition is an important first victory that cannot simply be dismissed. Marx was clear on this point: “Political emancipation is indeed a great step forward.”6 Rather, it is to imply that political emancipation is not the end but the beginning of an uphill hegemonic battle centering around the nodal points of liberty and equality.
The above account is typical of the traditional marxist critique of the neutrality of the state. Postmarxism, however, while in agreement with the marxist sentiment that state-centred equality should not be mistaken for non-state-centred equality, would insist on a number of clarifications which may obviate an essentialist slip.

What we have in mind, here, is a series of displacements that link equality to form to public to political to state on the one hand, and equality to substance to private to social to non-state on the other. Thus our agreed-upon observation that non-state inequities may persist/exist even if we accept that state inequities have been eliminated is illegitimately transformed (and causing a divergence of opinion between traditional marxists and postmarxists) into a desire for substantive equality and a condemnation of formal equality.

Our (postmarxist) quarrel centres on the formal/substantive dichotomy. The reason for this derives from the fact that it often serves to import a traditional understanding of false-consciousness. Thus, formal equality evokes a sense of illusion and false-consciousness, and substantive equality functions to promote a sense of ‘realness’ and truth. As we have argued elsewhere, however, a postmodern anti-essentialist approach forces us to revise such a conception in favour of one which seeks to establish a difference between closure, certainty, and truth on the one hand; and openness, undecidability, and hegemony on the other.

But how exactly was the illegitimate divergence made possible? It is here that the essentialist tendencies shared by both the liberals and their (traditional) marxist critics strike the eyes. For both disputants presuppose a fully constituted public space that can clearly be delineated from the private space, and whose demarcation coincides exactly with the separations implied in the pairs political/social and state/non-state. The equivalential chain that links, and then opposes, each side of these dichotomies is strictly
articulatory and thus hegemonic. It is an articulation that even ‘moderate’ liberals, such as Rawls, rely on in order to expunge issues of religion and sexuality from the public domain.

What a postmarxist approach teaches us is that every hegemonic articulation is subject to a constant signifier-signified slippage whose propelling overdetermination allows it only two degrees of freedom: fast-forward, or slow-forward. Slow rates of social change have led to sedimented and unquestioned meanings. Slow-forwardness is thus misperceived as static and essential. Increased rates of social and technological change have resulted in increased tensions -- tensions which are constantly prying open more and more sedimented social spaces to politically contested horizons.

By disarticulating this long-surviving chain, we find a whole new set of possibilities opening up. The state no longer has to be identified with the political or even with the public. This means that discriminatory hiring practices conducted in the ‘private’ sphere can be legitimately contested on a political level. Disarticulating the state from the political also means that, though state apparatuses (legislative, executive, judicial) have been, and still are, useful avenues for political debate and contestation, they need not be the only ones. New arenas for hegemonic struggle can be invented and established. But we must remember that the process of disarticulation is not something that has sprung up out of logical necessity. Of course, it was always already logically possible; but it also has a specific historical origin, namely the rapid rates of growth and expansion and the accompanying proliferation of new social movements so characteristic of a late capitalist society.

So, where does that leave the dichotomies we were so ready to deconstruct? Certainly, we are not suggesting that we can do without them. Rather, we are offering an alternative approach to conceiving the split. Instead of attempting to classify relations as either public/political or private/social on an a priori basis, perhaps we can entertain the notion that each element of the pair relies on the other for its existence, and that how
exactly each becomes entangled with, or connected to, other signifiers is a matter of historical contingency and contextual specificity.

How else can we explain the feminist motto that the 'personal is political'? What was always taken to be of a private ilk (the personal) has suddenly been dramatically transformed into a site of political contestation. The political does not entail a necessary link to the state. Indeed, as it is often argued, it is the very absence of the state in, for example, spousal abuse cases that has spurred political debate. Nevertheless, the fact remains that, in contemporary society, most avenues of political satisfaction lie at the doorstep of the state (whichever of the three branches of government one chooses). Thus, issues in which the state is prima facie absent must, in the end, always be converted into ones in which the state is implicated: the state becomes present through its very absence. And this 'jumping through the liberal hoop' will be necessary unless and until new non-state fora (for instance, local and national media-mediated, interactive, issue-specific, polling and voting) or quasi-state fora (minimally bureaucratic, administrative tribunals and ad-hoc commissions) become more accessible.

We see, therefore, that what is political cannot be determined in advance. This is because the political is about contested meanings, and meanings are overdetermined and constantly evolving. On a general level, we could say that the political refers to interrogation, contestation, and hegemony. The social, on the other hand, refers to an unquestioned mode of existence, to what is assumed, uncontested, habitual. Each of the political and the social (and any other such dichotomy, for that matter) requires its opposite for support: the social tries to hegemonize the political, and the political constantly disrupts the social. They exist in a permanent and irresolvable tension in which the social sediment is temporally disrupted by, and spatially dominating of, political reactivation.

In this view of things, we can begin to see a basic asymmetry which unsettles our apparently neat compartmentalization. And this has to do with the temporal nature of the
political, which is, of course, linked to Lacan’s real order and to Laclau and Mouffe’s antagonism. The political as a signifier is at once meaningless and meaningful -- in other words, split. And this split makes the social possible. In this sense, the political has logical priority over the social. Why? Because it is the very *pronouncement* of a particular political demand (eg., the right to economic equality for women) which retroactively creates the political/social split. Again, we see here the logic of the signifier: the particular political demand manifests its split by shedding its particular content to totalize and focus a diffuse sense of dislocatory injustice into a coherent opposition to....what? The *social*.

Now, to conclude this discussion, let us draw out the implications stemming from *refusing* to hear a new demand. What happens, in other words, when no public forum (usually linked to the state) serves as a site at which the *status quo* can be challenged? Clearly, this would result in the build-up of antagonistic tension. The antagonized force would either be coerced into silent submission or would be forced to seek alternative avenues of expression (civil disobedience, media-mediated information campaigns, violence, etc.). We have, here, an indication of what Chantal Mouffe is aiming at when she calls for a transformation of antagonism into agonism. It is not so much that antagonism is eliminated, but rather that it is channeled into an environment in which struggles to hegemonize relevant empty signifiers are more likely to be conducted with words rather than with swords.

So, assuming that an issue is recognized and *accepted* as political (ie., contestable, revisable) and has found a suitable political forum, let us now examine the traditional rights debate as it tackles the issue equality and how that plays out in the legal arena.
Formal versus Contextual Approaches to Resolving Equality Issues

The legislature and judiciary, as part of the state apparatus, are not only instruments with which, as we have just seen, the socio-political space is artificially carved into the formal and public sphere on the one hand, and the informal and private sphere on the other hand; rather, they are also the instruments with which the concept of equality is defined, once it is determined that we are on the public side of the divide. These are the two private/public hurdles that Judy Fudge identifies as restricting the ability of women to attain substantive equality in the context of Canadian Charter litigation:

First, it is used by the courts to determine the scope of the rights and freedoms guaranteed in the Charter. Secondly, once the hurdle of the Charter’s application is surmounted the distinction arises, albeit covertly, in the formal approach to equality rights which has typically characterized liberal constitutional jurisprudence.7

It is apparent, according to Fudge, that the conception of formal equality has predominated in the legal discourse, which usually involves unfolding the tautological Aristotelian definition of equality8 in terms of the sameness-difference logic which, as Martha Minow points out,9 is usually done without reference to that from which the assessment of sameness or difference is made. Thus, numerous feminist studies by, for example, Carol Smart and Catherine MacKinnon, have shown that upon closer scrutiny, it becomes apparent that this reference point can be taken to be, more often than not, the male sex.10 The argument, in other words, is that a male-biased formal equality conceals a female-burdened substantive inequality.

The result of such a conception of equality is, among other things, “equality challenges by men to legislation designed specifically to address women’s economic subordination,”11 thus depriving “women of important material benefits provided by the
and causing feminist organizations “to spend precious time, energy and money in the courts defending legislation that it took many women many years to achieve.”

And we find the same frustration exhibited by scholars in the context of the race struggle. Kimberle Crenshaw, for instance, remarks that “[w]hite race consciousness, which includes the modern belief in cultural inferiority, acts to further Black subordination by justifying all the forms of unofficial racial discrimination, injury, and neglect that flourish in a society that is only formally dedicated to equality.” Indeed, “[w]orking in tandem with legal consciousness, race consciousness legitimates the inequities of contemporary society.”

Now, the most often cited counterpart to, and remedy of, the formal conception of equality is the contextualized conception of equality. This “requires the court to consider the socio-historic roots of current inequality.” Indeed as Fudge points out, in the feminist context, “regardless of the different perspectives on the aetiology of women’s social inequality [whether economic, familial, sexual, etc. -- LJG] the vast majority of feminists now advocate a contextualized approach to equality questions which requires that judicial recognition be given to women’s private experience of subordination.” However, as Fudge goes on to say, the fact that it is logically possible to invoke such an interpretation does not mean that it is likely, at least on a systematic basis.

**Taking a Closer Look**

What the above account implicitly highlights is the precarious nature of purportedly forceful distinctions which aim beyond the confines of a particularized example. We witness, again, the subtle but noticeably subversive slippage which works
to undermine both the liberal legal framework and the marxist-feminist critique of it. Let us examine this more carefully.

At first, we had the invocation of the public/private dichotomy in order to exclude new equality demands. Think, for instance, of the sexual assault charge lodged by a wife against her husband which, on account of her status as wife (and, therefore, a private matter) was until very recently invalidated by tort law. Now we have the re-invocation of the public/private distinction by liberal legal ideology in an effort to exclude otherwise relevant evidence in the assessment of a (public) equality claim. This so-called ‘exclusionary’ practice is what feminist and race critics stigmatize as the formal approach to equality. And in opposition to this, they advocate a contextualized approach whose main characteristic will be to be more ‘inclusionary’.

What often happens, however, is that ‘formal’ equality becomes strongly imbued with the notion of illusion, and ‘contextualized’ equality becomes identified with reality — a slippage similar in form to the one we outlined in our discussion on the neutrality of the state. In other words, we slip into a traditional ‘false-consciousness’ mode of critique in which the contextualized approach is hegemonized by a particular ‘real’ description (and its accompanying ideal) and treated as the only alternative to the liberal status quo.

How, then, can we maintain our critique of the liberal status quo without appealing to a transparent truth? Simply by insisting on, and maintaining, the distance between the challenge to the status quo (the empty signifier) and its multiple possible incarnations (the fillers). We see, therefore, that conservative-liberal jurisprudence has traditionally operated to exclude other possible alternatives, mainly through the citational mechanism: The standard practice of stare decisis operates to maintain and entrench signifying structures. We can thus contrapose this mode of rigidification with one which aspires to greater fluidity: the contextual-historical approach, which is meant to consider, for example, “the structures of power in society and the systemic legacies of exclusion involving the group based characteristics of individuals.”

18
What we must bear in mind, however, is that no pathological appeal is made to a unique, 'really' existing state of affairs. What is suggested is a widening of the horizon of possible evidence to be considered for judicial reasoning. This translates into an increased pool of floating signifiers (via, for example, social science data) from which to fashion new equivalential links to equality. No doubt predictability and certainty will suffer on account of this broader approach. But, happily, such loss is readily compensated by the freedom that rushes in to take its place.19

One last comment before we move on. Increased freedom does not mean that (what someone might consider) progressive outcomes will follow. It means only that the range of possible outcomes and justifications increases. Let us recall Judy Fudge's complaint that 'formal' equality provisions have necessitated the investment of valuable time and money to defend progressive legislation. Here, we see Fudge fall into the essentialist trap whereby a progressive piece of legislation is seen to warrant and deserve the status of Truth and permanence. In short, we have the conflation of 'progressive' with 'substantive' with 'unique' with 'real'. When we fully assume the precarious and hegemonic nature of the political (here, within the legal) we realize that gains must be constantly defended and justified just as much as losses must serve as impetus to further lobbying and persuasive action. The very real frustration experienced in losing recently fought-for gains should not tempt us to reach for 'substantive' equality without debate. What is this if not the surfacing of the totalitarian temptation? Instead we must persist in being creative in our progressive strategizing.
Do Rights Reproduce the Form of the Capitalist Mode of Production?

We come, now, to the final criticism of the rights discourse that we will be examining. The challenge to the rights discourse from this perspective asserts that the notion of rights is itself inseparable from, and inextricably linked to, the mode of production -- here, the capitalist mode of production. Thus, no matter how good the intentions of a rights user are, their use will only further perpetrate the deep-seated evils of capitalism, namely class oppression and increased commodification.20 “In short, the politics of the new social movements may be channeling struggles without challenging the deeper relations of subordination.”21 Thus, it is suggested that the tendency of rights toward abstraction “is characteristic of legal methodology... [and] in fact part of the very structure of liberal law under capitalism.”22 Others more visibly essentialist suggest that “ultimately... the realization of meaningful civil liberties and a meaningful rule of law depends on the overthrow of capitalist economic relations and the establishment of a democratic socialist mode of production.”23

The postulation of a link between the mode of production24 and forms of politics and law has been in common currency since, most prominently, the time of Marx. In his terminology, the base (the economic system) instrumentally (or structurally) determines the superstructure (ideas, beliefs, modes of thought, etc.).25 Thus, with the replacement of use-value by exchange-value, there followed a transformation in the form of thought from the concrete to the abstract, content to form, and quality to quantity -- a process, Marx suggests, which inevitably leads to a ‘fetishism of commodities’. It is this transformation that has permeated the whole of the superstructure. The law, therefore, as part of that superstructure, has inevitably reflected this transformation. So, as has been most forcefully argued by Pashukanis, the analogous and paradigmatic form in the law is none other than the ‘fetishism of rights’. Integral to such a conception of rights are the ideas of individualism (contracts are entered into voluntarily by autonomous and self-
determining agents), universality and abstraction (all legal subjects have the legal -- not necessarily real -- capacity to own property), indeterminacy (rights can also serve to entrench the dominant interests), and formal equality (legal subjects are to be treated as equal, despite unequal de facto circumstances).26

The question, which is of central importance to this section, then becomes to what extent can rights (and accompanying forms), whether in the political or legal arenas, assume a sufficiently autonomous life so that their existence and use do not necessarily or, under certain conditions, even probably, rely on or support a mode of production and its associated ‘evil’ ideologies and practices.28 Ultimately, can they be used to subvert those associated evils, or even the very mode of production to which they arguably owe their life to?

As we have already discussed the concept of formal equality, we will now describe several other concepts which are typically offered as debilitating forms of the capitalist mode of production. It will, perhaps, be helpful to think of several questions as we read on. Is it possible, for example, to “establish on the one hand the mechanisms whereby the legal [or political] system operates as a specifically capitalist structure, and on the other hand those features of legal relations within (but not of) capitalism which are not so inscribed with its logic and hence potentially transferable to alternative social systems”?29 Can the legal system operate against itself, in the sense that internal inconsistencies and contradictions (of forms and ideologies) can be highlighted and exploited to create the space necessary for counter-hegemonic dereifications and reifications?30 To what extent can the ideologies of law31 and the ideologies in law32 be deconstructed, diffused, and demystified so as to escape the aura of inevitability that paralyses us into inaction?33 Can rights be appropriated by a different discourse, and thus conceived differently and perhaps progressively? In other words, does the fact that historical events are overdetermined mean that the privileging of particular conditions (here the mode of production) in the context of an explanation is nothing more than a
hegemonic articulation, and thus subject to a competing or subversive articulation? Indeed, are rights as conceived by a liberal ideology, to some extent already appropriated by subversive discourses? And how does one deal with the fact that a hegemonic articulation may itself change the configuration of past events so as to convert certain events' status into ones with an aura of centrality and inevitability?

**Individualism: Alienating or Not?**

What does it mean to say that rights are individualistic? What does it mean to say that individualism fosters a sense of alienation? In what sense is this bad? In what sense is this good? These are the kinds of questions we will try to address by responding to the following sample of the debate over the individualistic nature of rights.

Let us look at a typical account of rights as debilitatingly individualistic and alienating. Such an account usually begins by pointing to its close affinity with the notion of negative liberty, ie., "the right to do and perform anything that does not harm others."³⁴ In the words of Marx, "the political liberators reduce citizenship, the political community, to a mere means for preserving these so-called rights of man [sic] and that the citizen thus is proclaimed to be the servant of the egoistic man [sic]."³⁵

It is this 'egoistic man', in his legal rights-bearer incarnation, that Gabel describes as being caught in the rather unfortunate double-bind situation of on the one hand denying himself the recognition of his need to experience a substantive connection between himself and others by subscribing to an alienating individualistic form of rights; and on the other, projecting a fantasy of community and connection (the 'substitute connection') in which individuals are united through common alienation in a bid to deny
the very alienation which gave rise to the fantasy. Gabel explains the debilitating nature of individualistic legal rights:

We guard ourselves against the risk of taking existential action against our alienation by repeatedly telling ourselves that our alienation is inevitable, while at the same time denying that this alienation exists. And by acting toward each other as if we believe all this and that it must be believed, we coerce each other into remaining passive observers of our own suspended experience, binding together inside the anonymity of artificial self-presentation and perpetually keep us locked in a state of mutual distance.36

And as if the alienating effect of individualism wasn't enough, Gabel argues that it facilitates the process of co-optation by state officials who would rather maintain the status quo.37 This is because the status quo is characterized by alienation and so are the rights which are meant to challenge it.

Now, could this account ever aspire to have the final say on what exactly rights mean or imply? According to Patricia Williams, there is a significant divergence of meaning attributed to the rights symbol by non-mainstream groups and individuals.38 Indeed, both Williams and Goldfarb assert that in many instances, "women, like minorities, from their low rung on the social ladder, are attracted to that element of protection that inheres in [the] distance of individualistic rights."39 Thus, Williams calls "not for the abandonment of rights language for all purposes, but an attempt to become multilingual in the semantics of each others' rights-valuation."40 Thus, in her own version of the 'intersubjective ideal', she claims that "bridging such gaps requires listening at a very deep level to the uncensored voices of others."41 It is in this manner that "feminists and people of colour have... recognized certain aspects of CLS literature that have overlooked or undervalued their experiences and interests."42

So, "[a]lthough it has been argued that rights are inherently individualistic because individuals can 'possess' them, rights need not be perceived this way."43 Thus,
as was the case with marginalized individuals of colour, so too in the case of marginalized gender groups (often women) are alternate meanings attributed to rights. For instance, Schneider argues that “[f]or women, the assertion of rights replaces a hierarchy of rights with a web-like understanding of responsibility in relationships that ‘changes an order of inequality into a structure of interconnection.’”\(^{44}\) Rights can, therefore, be “made ‘for’ something, not only against others and the state.”\(^{45}\) She goes on to note how Mari Matsuda’s work highlights

the workings of a distinct political consciousness that can emerge from minorities’ experiences. Matsuda asserts that those who study the experiences of the oppressed can use the resulting insights to transform rights discourse into critical legal activity. She claims that ‘looking to the bottom’, her name for this methodology, can generate a critical legal consciousness that challenges oppressive ideologies such as racism.\(^{46}\)

Indeed, some scholars have already looked to the discourse of law itself to seek out instances of rights which already have a group ‘affinity’ that may be more congruent with oppressed group interests. Mark Tushnet cites as examples, the notions of ‘fluid class recovery’ (“a device that provides a ‘remedy’ to people who have not themselves been injured”), “group-oriented affirmative action ‘remedies,’” discrimination as group-based, and indigenous and minority language group rights.\(^{47}\) In addition, he suggests that “some dimensions of the traditional concept of individual rights seem to demand a background concept of group rights if they are to be understandable.”\(^{48}\)

Another scholar\(^{49}\) further deepens, and thereby subverts, liberalism, as traditionally understood,\(^{50}\) so as to show that it offers a “compelling account of the relationship between individual autonomy and communal embeddedness.”\(^{51}\) Will Kymlicka argues that since liberalism is premised on the idea that individuals are “self-originating sources of valid claims” and choices, and since the range of options from which choices are made are culturally determined, it follows that “the liberal conception of the individual, and the individual’s freedom of choice, presupposes membership in a
cultural community. Kymlicka suggests that group rights, such as aboriginal rights, can be justified as rectifying a circumscribed choice caused by their historic oppression (by the majoritarian and dominating English and French cultures).

The question of whether rights are actually individualistic or actually communal is to presuppose an essential link. As we have seen, however, such a link does not exist. Rights, more than most signifiers, is visibly riddled with ambiguity. Any attempt to articulate it with other signifiers can only be a result of a hegemonic intervention made possible by its irreducible indeterminacy.

Abstract Indeterminacy: Beyond Good and Evil

What becomes obvious after even a brief overview of the differing positions held vis-a-vis the nature of rights is its radical indeterminacy. And what's more, the indeterminacy not only attaches itself to the meaning of the signifier (of the symbolic order), but also to the feeling (of the real-imaginary order) that a particular meaning may evoke. Thus, while two scholars may acknowledge the alienating character of rights, one may criticize this and another scholar may celebrate it. We see that establishing the exact identity of a right (as individualistic and/or alienating) is not sufficient to the critical task. Indeed, we are faced with the blatantly contingent manner in which an articulated equivalential chain emerges. And, no sooner to we realize this than it becomes possible to conceive of its disarticulation. In short, we find ourselves having to admit that a closer look at 'rights', 'individualism', 'alienation', reveals a persistent resistance to a 'final' definition. (And here we may recall the objet petit a which constantly escapes the grasp of totalizing exercises.)
And this is where another attack on the discourse of rights finds its entry point. If branding rights as inherently individualistic and alienating is off limits to a proper critique of the rights discourse, why not transform this turn of bad fortune to our advantage and, while admitting that rights are indeterminate, make that the very reason for a castigating criticism. The indeterminacy critique claims that rights do “not solve the problem of how to resolve conflicts between rights and cannot transform social relations.”\(^{54}\) Now, at first, it may be hard to see why this should even be considered a blemish worth commenting on. However, as we delve deeper into the offered rationales, we begin to discern what grounds such seemingly innocuous criticisms with caustic force. Thus, Gabel, after an intricate web of reasoning, is able to assert that indeterminacy does warrant contempt for “it reassures us that the right’s concealed ontological meaning -- the forbidden wish for the free and open reciprocity that would result from genuine social connection -- will never be revealed or concretely realized.”\(^{55}\) [italics added]

We see, therefore, that it is the lack of a genuine social connection that brings on the indeterminacy critique. But, what, pray tell, is this genuine social connection? Yours? Ours? Gabel’s? We have, in short, another case of moderate essentialism in which the epistemological becomes illegitimately fused with the political. We must insist that indeterminacy opens up the possibility of progressive change, not the guarantee. And while this is frustrating from a progressive perspective we need to acknowledge the strictly political character of this frustration and not allow it to cloud our theoretical musings. It is the opening up of new possibilities that can be viewed as positive from a progressive perspective. “Thus, an idea may be both what it appears to be and something else at the same time; the idea may contain the seeds of its own contradiction, and ideas that appear to be in opposition may really be the same or connected.”\(^{56}\) So, while it is true that rights in themselves do not guarantee a progressive outcome by virtue of their indeterminacy, it is also true that without indeterminacy the progressive option would
have been squeezed out of existence by the present mainstream conservative-liberal interpretations.

We can now return to our discussion of rights in the context of individualism and alienation. Has scholarly discourse, in its endless pro and con arguments centering around the rights debates not emptied these signifiers of their content? Have they not become, strictly speaking, floating signifiers to be fought for by competing discursive appropriations? And how would this have been possible if not for the indeterminacy that inhabits each and every signifier? 57

Let us examine, for example, the discourse that gives the critique of rights as individualistic its force. Many will not deny that this critique does have some common sense appeal. Where should we look for this, then? What does the presence of such a feeling owe its existence to? Most likely to its very strong associations with such particular rights as property and expression, connoting selfishness, lack of care for others, lack of dialogue, narcissism, and greed for money and property, all of which are usually thought of in condescending ways. But, of course, this ‘meaning’ can only be the product of the hegemonic articulation just described, implying competing meanings. And we begin to see signs of a strategic dilemma. If, indeed, it is this conception of rights that has achieved hegemony, do we attempt to articulate it to other notions, such as care and ‘dialogic intersubjectivity’ and risk importing and rigidifying the dominant meaning?

Of course, there is no simple answer to this. The important thing to remember, however, is that a strategic intervention will have a chance of being successful only if attention is paid to the details of a particular case. As to the indeterminacy that makes counterhegemony possible, we must not miss its connection to the split of the signifier. In other words, as we will be seeing in the next section, the signifier ‘right’ not only addresses itself to the particular demand, but it also addresses itself to the system (status quo) which it wishes to modify. When, for example, someone suddenly feels that an
injustice has been perpetrated against her and she reaches for a right, it would be foolish to declare that move individualistic and ‘essentially’ selfish or self-deluding. We must make an (ethical) effort to separate epistemological issues (the frontier of the modern/postmodern debate) from the political issues (the arena of values).

Reification and Objectivity

Two other forms that draw the ire of traditional marxist and feminist critics, reification and objectivity, refer roughly to what Laclau refers to as sedimentation and the social respectively. As we have already seen in our discussion of the public/private divide, sedimentation refers to the process by which the political is erased and replaced by the social. And the social designates the domain of relations whose status and meanings are assumed and unquestioned.

Take, for instance, the problem of the unified subject. Inasmuch as reification denotes the process by which a particular chain of equivalences hegemonizes and thus naturalizes a nodal point, categories such as ‘woman’ or ‘class’ are naturalized by necessarily excluding a range of possible subject positions. “For example, even though women’s rights to reproductive choice have improved, access to those rights for poor women and especially poor women of color has not been adequately protected.”58 Or, to take another example, and in following Carol Smart, we can trace the genealogy of the category ‘bad mother’, as a subcategory of Woman, to indicate how (‘patriarchal’) social logics operated such that the category swallowed more and more subject positions, starting with the mother who killed her bastard infant, and eventually including those mothers who were poor, or who never married, or who were divorced. The perverse assumption underlying this trend is that “the mother without a husband is a danger.... It is this Woman of legal discourse that feminism must continue to deconstruct but without
creating a normative Woman who reimposes a homogeneity which is all too often cast in our own privileged, white likeness.”

What must be kept in mind at all times, however, is the political nature of the move which attempts to assert an inclusionary approach to law, with a specific list of subject positions to be brought under consideration. From a postmodern perspective, they cannot be seen as attempts to reach an underlying ‘truth’ or ‘justice’, for these are strictly unattainable. Rather, they are political attempts to re-hegemonize the relevant empty signifier with a particular content (equivalental chain). So, a reification critique that claims that the rights discourse “‘freezes and falsifies’ rich and complex social experience” mixes epistemology with politics. The problem with the traditional reification critique is that it conflates fixation, which is a description of its operation, with falsification, which is an evaluation stemming from the observation that present dominant nodal fixations originate primarily from the liberal and conservative discourses.

With this in mind, let us see how, from a progressive viewpoint, the significance of the political-civil dichotomy can be brought into relief by describing one version of the process of reification: The formal accessibility of all to equality and liberty now constitutes the political/public ideal, but it is its conflation with, and obfuscation of, the civil/private reality that ensures the persistence and longevity of the liberal discourse. It thus serves to legitimate the perverse logic in which the very existence of oppression itself becomes evidence that the plight of the oppressed is their own fault. As Crenshaw points out, in the race context, race consciousness (eg., the belief in race inferiority) “reinforces whites’ sense that American society is really meritocratic and thus helps prevent them from questioning the basic legitimacy of the free market.” Further, racism “combined with equal opportunity mythology, provides a rationalization for racial oppression, making it difficult for whites to see the Black situation as illegitimate or unnecessary.” In other words, the
race neutrality of the legal system [operating in an analogous fashion to sex, property, and religious neutrality -- LYG] creates the illusion that racism is no longer the primary factor responsible for the condition of the Black underclass; instead, as we have seen, class disparities appear to be the consequence of individual and group merit within a supposed system of equal opportunity."

Conclusion

We have examined the traditional rights critique as it relates to state neutrality, formal equality, and the link between form and mode of production; and we have shown how a postmarxist, anti-essentialist, approach can correct and strengthen those (traditional) marxist criticisms. How? We have already suggested that the traditional critique conflates epistemology with politics; that it moves too quickly (and illegitimately) from the observation that progressive outcomes do not 'automatically' flow from rights discourse to the condemnation of the rights discourse. While it is true that the potential for change should not be mistaken for a guarantee for change, we should also guard against the proposition that progressive change can come about without difficulty and inventive political struggles.

The traditional critique thereby misses the crucial significance of the rights discourse, namely how it enables critique by creating the space necessary to conceive of progress in the first place. And what exactly is responsible for this discursive phenomenon? The logic of the signifier, of course. The radical ambiguity of rights owes its existence to the split of the signifier. It is this we shall go on to consider in more detail now.
Rights and the Logic of Desire

The rights discourse can be usefully conceived as a surface, namely the principle of equality and liberty for all, onto which competing demands fight for hegemonic inscription. As we have already seen, though such a principle widens the horizon of progressive possibilities, it does not by any means guarantee them. In other words, it is possible for demands to find expression through an individualistic or negative conception of rights, or through a relational or positive conception of rights. In the former instance, there is a tendency to highlight liberty with a view to maintaining the status quo; in the latter instance, equality is emphasized with a view to progressive change. However, far from eliciting feelings of regret, this constitutive tension between the logic of difference and the logic of identity should be welcomed and affirmed. It means that nothing should be taken for granted and that any gain can only be regarded as temporary and subject to interrogation and substitution.

What must be fully embraced is the notion that the political battle is an interpretive battle. This is not to say that every interpretation is as good as any other. Rather, it means that some interpretations are better than others and that the best interpretation is the not The Best (The Truth), but one that achieves temporary hegemonic status. We see immediately, then, that the distinction between formal and substantive equality can be problematic if we are not careful. The distinction can only appear meaningful from the perspective of the leftist critic. The split is necessary because the liberal-conservative wishes to safeguard the status quo which already embodies equality. In other words, the split allows the left to argue simultaneously against equality and for equality. The question then arises ‘why even bother to retain the word equality?’ And the answer, of course, has everything to do with the purchase this signifier has on the popular imaginary. It also has to do with hegemony.
In order to better rationalize this split and understand its hegemonic roots, however, let us recall the logic of the signifier as we elaborated it in chapter two. Deep within the ordered and sedimented social there arise a series of dislocations (women feel they are not given the opportunities they desire, the poor feel their predicament is caused through no fault of their own, etc.). These dissatisfactions soon develop into antagonisms. The task then becomes to seek out appropriate empty signifiers (master signifiers, nodal points) with which to ‘diffuse’ these antagonisms. The antagonism is thus transformed into an agonism when the interpretive battle is exposed. In the case at hand, ‘equality’ is exposed as a floating signifier which can be just as easily articulated into a leftist equivalental chain as a rightist equivalental chain. Or, in an alternative formulation, the incidence of alternative interpretations within a common public space effectively empties ‘equality’ so that particular incarnations may have the opportunity to fight for hegemony. For that moment, therefore, we glimpse the constitutive split of the signifier: first, as a particularity (either as ‘formal’ or ‘substantive’ equality); second, as a universality (representing a totality or system as against a threat to totality).

Thus, by offering two alternative versions of equality, the leftist critic has widened the horizon of possible worlds. But what s/he has not necessarily done, and this is the crucial point, is expose the contingency of the definitional process, ie., the idea that the empty signifier ‘equality’ in no way predetermines its particular content (or vice versa). And this (the irreducible contingency), as we know, is due to the real dimension which forever separates the form from the content.

Now we can also understand why, earlier, we mentioned that the distinction between formal and substantive equality can become problematic if we are not careful. It becomes dangerous if it is linked to the traditional conception of false-consciousness. What happens oftentimes is the following. Formal equality is linked to false-consciousness, and substantive equality becomes linked to true-consciousness in more than just rhetorical form. In other words, the hegemonic struggle ceases to be interpretive
-- it becomes foundational. An appeal is made to a Truth which is somehow uniquely accessible and self-evident to the one claiming clairvoyance. The alternative rendition of 'equality' is not offered as a strong candidate but as an ultimatum. If we must retain the notion of false-consciousness, therefore, it must be understood to apply to the conviction that access to an unmediated (or mediated) Truth is attainable and that a final, utopian closure of the Social is possible.

The split which we highlighted within the signifier 'equality' can be evoked, of course, in other signifiers. And let us briefly recall the mechanism by which the signifier is chiseled out of its fixed ideological state of fullness (ie., one in which the split is concealed) and released in an empty, floating state, ready to supply antagonistic camps with a new element for appropriation. A series of new demands are articulated (equivalently linked) to the signifier in question, causing a displacement of its signified. A series of such displacements may result in several signifieds coexisting at once, thus resulting in a radical ambiguity (not equivocality) within the political domain. (WES, 167-168) The signifier is thus unmoored and begins to float.

Now, of most interest to us in our present discussion is the notion of the right itself. It is perhaps one of the most frequently articulated signifiers of contemporary political discourse. Though it is somewhat rigidly associated (and thus virtually synonymous) with the principle of equality and liberty for all, its constant articulation with a vast array of concrete demands (right to free speech, right to privacy, right to property, right to security, right to life, right to die, etc.) assures it of its empty status. And it is this empty or floating character which makes it such a successful candidate in modern democratic discourse.

Why? Let us recall our very brief discussion of rights in the first chapter. There, we noted the totalitarian temptation inherent in the attempt to exhaustively enumerate all the specific rights which, if granted, would guarantee a society free of antagonism. We
remarked that this belief constituted a fantasy in need of traversal. Now we can perhaps see why the notion of the right as the empty universal, in its opposition to the particular filler, might assist in this task: because it constantly reminds us of the real chasm (jouissance) that bars the specific symbolic content (a/S2) from ever completely filling out the imaginary filling function (S1). Jouissance can only be encircled, never grasped.

In short, the rights discourse (more or less) succeeds in keeping the split alive without succumbing to the illusion that it can be seamlessly healed. And, as we will see later, it is this dimension which radical democracy emphasizes and which distinguishes it from traditional communitarianism and contemporary (hegemonic) liberalism.

Let us specify a bit more precisely this real dimension whose other name is antagonism; and let us further link it to Lacan’s dialectic of desire. The antagonism traverses the signifier ‘right’ so that, as Joan Copjec notes, it installs an unbridgeable gap between the universal right and the particular right.

For this reason Lefort will not speak simply of rights, but more properly of the “right to have rights.” This formulation is strictly equivalent to the Lacanian notion of the “desire to desire.” In each case the raising of rights or desire to the second degree installs a gap, a cut between all articulated rights and desires and the subject supposed to articulate them [i.e., the split between the subject of enunciation and the subject of the enunciated -- LIG]. It severs the subject from its desires by insisting that the subject is, by definition, ignorant of what it wants. This in turn divorces the question of rights and desires from that of private property, since it eliminates all traces of that “belong to me” aspect that is necessary to the very notion of property. If the subject doesn’t know what it wants, then it is obliged to seek it in the Other. Far from dissolving the bonds of dependency (which was Marx’s great fear), this conception of rights requires the subject to forsake its solitude and seek the community of others. Desire becomes the desire of the Other.

Now, desire is in danger of collapse, of course, if you take this last phrase to mean that our desires are historically and socially constructed, in the sense that we desire what our own society values.... Unfortunately, it is still not needless to say that this is “not” what “desire is desire of the Other” means. Desire is manifest not in the coveting of the other’s possessions, but in the attempt to interpret his statements. For desire is, above all, a response to the perceived inadequacy of language. It begins when one perceives in language -- or in the other’s statements -- something more than language. Notice, I did not say “beyond,” but “in” language some trouble, some friction, some grain (as Barthes called it). This surplus something is nothing more (and nothing less) than the failure
of the statement to designate itself directly, to coincide with itself. We can translate this as meaning: desire recognizes the essential ambiguity of language, hence the necessity of interpreting what it is the other wants to say in what he says [i.e., finding a fantasy with which to answer 'che vuoi?' -- LJG]. But since words are the only vehicles of desire, desire can only be seized through them; that is, desire must be taken literally.67

Let us invoke our common sense understanding of the operation of the rights discourse. When we assert a specific right (to privacy, to a minimum wage, to day care facilities, etc.) we do so because we feel somehow dislocated. Our reasonable expectations are suddenly not fulfilled and a powerful sense of injustice emerges. A specific right is then sought to fill this lack (of justice). We see, therefore, that the right is not only directed at a particular demand (the content of the right), but also at the justice that the demand itself aims at (the right to have a particular right).

Now, since the content and the form of fullness that the content wishes to incarnate are radically incommensurable, the specific right which will achieve hegemonic status will be radically contingent. This means that the rights which are to serve as conduits for justice can not be determined in an a priori fashion as the totalitarian would like. The inevitability of social change results in wholly unforeseeable dislocations whose only hope of resolution is access to the magic box of rights. And it is the universal ‘right to have rights’ which ensures a constant supply of particular rights — rights to be retrieved one by one as antagonisms surface.

In a period of rapid social and technological change, therefore, we would expect a proliferation of ‘new’ rights. And is this not the case in our late capitalistic society? Does this not explain the growing number of ‘new’ social movements? Thus, for example, we have the right to a clean and healthy environment. But, of course, this right is not the sole participant in the fight to a ‘better’ society. Established interests also have access to the magic box, so that the antagonism is expressed in an opposition between the environmental right and the right, say, to economic security. The antagonism then plays
itself out in political, legal, and other fora. We could say, therefore, that the rights discourse provides a kind of 'safety valve' so that antagonisms, rather than automatically erupt into violence, are transformed into agonisms -- institutionalized hegemonic struggles where one right begins to totalize and represent an opposition to an 'unjust' system and another totalizes and represents the defence of a 'just' system. And as more and more social spaces are converted into political spaces, the more the contingent nature of the former evidences itself. This is what a radical democratic project seeks to uncover through an articulation designed to link a series of such autonomous political spaces -- the new social movements.

But, while we approve of the non-totalitarian merits of the rights discourse and the contentless surface of inscription it offers, we stop short of declaring the proliferation of rights as an unqualified good. We shall have recourse to Lacan's dialectic of desire to explain this apparent paradox.

As Copjec points out, Lacan's 'desire to desire' is exactly homologous to Lefort's 'right to have rights'. In other words, our particular desires can never fill the lack which is responsible for setting the dialectic in motion. Again, we have the logic of the signifier working at the very heart of desire: it is the radical incommensurability between the particular content (desire) and the empty form (desire to desire) which makes possible this impossible self-propagating machine. The lack always seems to exceed the filler which seeks to fill it. It is this incompatibility which gives rise to desire.

And do we not have here Lacan's famous formula for desire, namely that desire is caused by the difference between the demand for love and the physiological need? (Cf. TN, 119-124) The child, for instance, in asking for food, not only seeks to satisfy her hunger but, more importantly, looks for a display of love. The food, like the concrete right, serves two incommensurable functions: the filler function and the filling function.
The unfulfilled surplus (*plus-de-jouir, objet petit a*) is what propels the contingent and metonymic desire: any object can serve as (unsuccessful) filler.

And can we not discern this logic in the very operation of capitalism itself? Is not the surplus value (free labour) that exceeds the use-value not exactly homologous to the *plus-de-jouir* that exceeds the proposed filler? Is the *objet petit a* not the object-cause that keeps the dialectic of desire moving forward? Does not money keep the world going round in this fashion?

In this view, perhaps we could risk the thesis that the rights discourse does indeed have the same form as the capitalist mode of production, as many structural marxists like to believe. The crucial point to notice, however, is that the notion of rights does not *derive* its form from capitalism, as it is argued in traditional marxist doxa. Rather, the rights discourse and late capitalism *share* a common form: the logic of the signifier.

We can now offer a different perspective on the Lacanian ethical maxim 'don't give way to your desire'. And we will see how it can give us a means to stave off the potentially explosive proliferation of rights often blamed on an unwarranted emphasis on individualism -- extensions which often degenerate into absurdities, thereby discrediting, and threatening the collapse of, the very principle responsible for their existence: equality and liberty for all. The ethical stance can be conceived as an attempt to keep the split of the signifier alive. In this view, the desire we should not give way to is the (totalitarian) desire to collapse the universal into the particular (or vice versa); to attempt to grasp *jouissance* by believing it is possible to fill the lack to the brim, without any leftover; to achieve a state of perfect fit; to search for a foundation of certainty which will be perfect and permanent. Absurd and gratuitous extensions are only made possible as a result of the conflation of the signifier's two identities, i.e., when the concrete demand is itself believed to be the ultimate remedy, the only possible filler of the lack. The call not to surrender our desire does not mean we should not assert our concrete rights; rather it serves to remind us that the granting of such rights will never fill the lack that gave rise to
the demand. The idea is that this paradoxical realization will result in a diminished pathology of rights proliferation -- or, for that matter, a diminished pathology of capitalistic commodification.

It is probably worth recalling our continual references to contingency and placing them in the context of our discussion of the rights discourse. As we mentioned in chapter two, contingency denotes the tension that characterizes the relation between the two identities of the signifier. On the one hand, each depends on the other for its existence (the universal right could not exist without the particular right, and vice versa). On the other hand, the identity of one does not predetermine the identity of the other (the identity of the particular right cannot in advance determine the form of the universal right or vice versa). The question then arises: what limits the possible particular candidates from attaining universal status? And the answer, as Laclau points out, is the sedimented nature of the social. In other words, the greater the degree of sedimentation of the social, the narrower the horizon of possibilities. That is why one of the most pressing tasks of progressive scholars is the exposition of the historicity of being by transforming more and more social spaces into political spaces. The effect of this exercise is to empty a whole slew of signifiers such that they can become readily available as floating signifiers.

A progressive tactic in the instance of the pornography debate, for example, consists in reactivating the notion of pornography itself. In other words, the traditional discussion is dominated by the opposition between the right to free speech and the right to be free from moral offense: the obscenity debate. By deconstructing pornography itself (usually conceived in terms of offensive explicitness) we find other possible conceptions (an institution which perpetuates the domination of women by men through incitement to submission and violence; a means of sexually liberating oneself; etc.) which can then be equivalently linked to the appropriate competing right, or which can
themselves give rise to alternative rights with which to fight for a cause (as in the right to be free from physical -- rather than moral -- harm).

This analysis also applies to the nature of the rights debate itself. The debate is often conceived of as comprising two camps: one which believes that rights are individualistic, and another which believes that rights can be group-based. Of course, there is nothing wrong with being individualistic *per se*. It *becomes* wrong (for some) when its meaning is sufficiently sedimented and unquestioned in its entanglement with other sedimented structures of property, selfishness, lack of responsibility, etc. As part of the debate, therefore, we can see the benefits of loosening the grip of certain conventional notions. It has the effect of expanding the horizon of possible articulations and resolutions. What are 'stereotypes' but just such sedimented structures which give rise to 'knee-jerk' behaviour? Can we not explain the recent legitimation (and ensuing flood) of social science data in court proceedings as attempts to interrogate such stereotypes and provide a fresh source of floating signifiers for purposes of discursive appropriations? It is sufficient to recall the chiseling away of stereotypes necessitated by the recent 'battered wife syndrome' cases.

But let us return for a moment to our discussion of the contingent nature with which particular rights begin to serve universal functions. We implied that contingency does not mean *anything* is possible. There are indeed structural constraints which limit the field of possibilities. However, we attempted to show that such fields can be expanded (for either progressive or conservative purposes) through appropriate genealogical means.

We can now recall Lacan’s definition of desire as the desire of the Other. As Copjec notes, this is *not* the desire for another's possessions, but rather the desire to properly interpret another's *statement*; to somehow resolve the radical ambiguity resulting from the signifier's split; to answer by way of fantasy the 'che vuoi?' of Lacan’s
graph of desire. It aims at the substanceless surplus (objet petit a) which presents itself as the filler of the Other’s lack, but which forever escapes our grasp. The point which we wish to emphasize, however, is that the objet a can only configure itself from available material: the contents of the symbolic Other. And the less rigid the big Other (i.e., the more the floating signifiers) the greater the objet petit a’s possible guises, the greater the progressive (and conservative) possibilities, and the less predictable the future.

In making these statements relevant to our current discussion, we must note that the experience of the lack in the Other corresponds to our sense of dislocation. We feel that the Other is in some way deficient. But, paradoxically, the Other also holds the precious resources which can serve to fill the lack. This, then, calls for a splitting of the identities of the Other’s contents and the generation of floating rights and other signifiers, which may then be appropriated into alternative hegemonic articulations. In other words, a subject’s desire (and the Other’s desire) can only be expressed through the pool of available rights -- a pool whose rate of expansion is correlated to our awareness of the historicity of being.

We can see, therefore, that the subject’s (and Social’s) lack triggers a metonymy of desire in which a right is always shaped (but not predetermined) by the rights of the Other. The key to an ethics of desire is to keep alive the desire by not succumbing to the illusion that a concrete right can ever permanently fulfill its universal function. In so doing, it can serve to foster the feminine ‘non-all’ logic by which concrete rights would be added one by one (in contradistinction to the male ‘all’ logic which would necessitate an explicit listing, in advance, of all permissible rights). This would have the advantage of addressing the particularity of each individual claimant as cases arise. The paradox, of course, is that the very specificity of subsequent and unforeseeable rights claims is made possible by the universal and abstract character of the right to have rights. Thus, from a theoretical perspective, we could remark that the empty right to have rights has a real
dimension in the same sense that the subject does (ie, a 'quasi-logical-mathematical' status). Even the most impressive Herculean effort to exhaustively determine the 'content' rights constituting the right to rights ends in failure, just as the subject is characterized by the failure of the symbolic Other's attempt to interpellate the subject into an individual. It is the very attempt to do so which constitutes, of course, the totalitarian temptation.

The call to not give way to one's desire can also encourage a less pathological attitude by assisting us in accepting the forever unfulfilled nature of our (metonymic) desire, and thus staving off unnecessary or ridiculous rights extensions. Furthermore, it can incite us to empathy by identifying with another's blockage (rather than pathological content-value), ie., recognizing in the other ourselves as a subject of the signifier: the lack.

It is in this context, therefore, that the emerging right to a clean environment must be viewed. The above analysis urges us to look at the notion of rights more closely before entering the fray with a new environmental right. For, like any right, it gets caught in the dielectic of desire and so entangles itself with Other rights, especially those of women, natives, developing countries, etc. Each of them not only form alliances and enemies in competing for hegemony, but are also subject to competing (and often sedimented) interpretations. From an ethical perspective, it is important to keep these rights and interpretations (desires) alive by constantly reminding ourselves of the contingent nature with which they become articulated. And, as we have noted, the radical democratic project calls for an appropriate institutionalization of such hegemonic struggles.

One area ripe for such implementation concerns the international environment-trade debate. Such measures, as Housman notes, are still lacking, for "[u]nder existing international trade agreements, citizens are completely excluded from participating in the
conduct of international trade disputes." He suggests that there is currently no built-in procedural assurance that, at least with respect to the environment, governments are acting in the citizens' best interests. And the 'behind-closed-doors' approach so often resorted to in trade negotiations and decisions seem to support this view. In other words, the non-politicization of trade disputes means that the unevenness of the social remains sedimented behind closed doors.

It has become cliche to remark that the current state of anxiety with regard to the environment stems from the uncertainty of our fast-paced era of change. A Lacanian approach permits us to more precisely localize this anxiety. It stems from an overproximity to our estimate real, our jouissance. The relatively recent spate of real irruptions (which take the form of DDT contamination, the Love Canal tragedy, the near-obliteration of fish stocks, alarming rates of deforestation, soil erosion, and desertification, the last gasps of the Great Lakes, Chernobyl, etc.) has given rise to a frenzied attempt to heal these wounds. And this comes in the form of symbolic fictions, such as rights and responsibilities. The anxiety reflects the unbearable nature of the radical openness of the definitional process for it cannot but highlight the contingent nature with which an idea, principle, or belief (retroactively) attains an unmistakable aura of inevitability and naturalness. In short, it exposes the way in which contingency is retroactively converted into necessity, and teaches us that we must tackle one case at a time.
Identity Politics

The proliferation of antagonisms and their accompanying social movements that we spoke of in the context of the rights discourse is already a recognized feature of late capitalist society. The popular label usually associated with this phenomenon is, of course, identity politics; and its ubiquity is attested to by the fact that, today, numerous institutional decisions (eg., on issues of hiring, firing, programs of study, types of service, funding, etc.) are being made in those terms. Examples abound: universities, secondary schools, cultural institutions, funding agencies, the focus of media, and so on. And so too do the evaluations of identity politics. They range from a "breath of fresh air compared to the stifling environments of liberal and Marxist hegemonies" to an insidious form indelibly stamped with the mark of dogmatism, liberalism or capitalism and its (mal)distribution of resources and so in serious need of reform or even abandonment.

In this section we propose to elaborate upon our conception of the process of identification, as hinted at in chapters one and two, and to examine the relationship between the nature of identity and power structures. We will then look specifically at the legal discourse to see how this politics is played out.

The Process of Identification

When does the issue of identity arise? What makes possible the appropriation of certain signifiers as our own, as part of what makes us what we 'are'? As we saw in the first two chapters, this possibility can be powerfully understood by postulating the signifier as the signifier of the subject-lack, as split. And it is this split that manifests itself at the level of the social as antagonism -- an irreducible tension which, if not fully
acknowledged and assumed as the radical democratic project advocates, is often repressed in the form of a social symptom: the Jew or the Kurd, for example.

The process of identification is propelled by the lack of the subject which is projected outwardly as a social antagonism, and whose contingent nature entails radical exclusion. As our discussion of the logic of desire revealed, the rights discourse, with its strongly imbued connotation of liberty and equality for all, provides a surface of inscription for unforeseeable dislocations as they arise, one by one. So, for example, the persistent and loud noise emanating from an industrial plant two blocks away from a person’s low-income housing unit becomes a powerful source of discomfort, annoyance, unfairness. (It is irrelevant for our theoretical purposes whether such noise had a historical presence or simply appeared on the scene recently.) The rights discourse provides the symbolic resources to more precisely localize this antagonism. This can be done, for instance, by articulating the demand to be free of such noise with the right to a healthy environment and/or the right to be free of tortious nuisance and/or the obligation not to discriminate against the economically disadvantaged. The point is that at the moment of initial discomfort, the subject as lack emerges through a structural dislocation. The person’s identity feels incomplete and suddenly desires to be filled; and identification serves this function. The subject appropriates the signifier ‘environmentalist’, for example, as a subject-position standing in for the aspiration to a future fullness and from which it is blocked by the ‘industrialist’, who, in turn, stands in for ‘anti-environmentalist’ (which, to complete the mobius strip, stands in for the lack of the ‘environmentalist’); and which is why the environmentalist and industrialist are at one and the same time not determinative of one another and dependent on one another. This person’s identity, as environmentalist, is thus irrevocably split; it lives on the split whose (contingent) Other is the industrialist; it constitutes itself by repressing/excluding this Other. But what is of utmost importance to grasp is that but for the antagonism, no identity would have established itself. Identity and, more generally the social, relies on
its split, on social antagonism. And any attempt to eradicate antagonism eradicates the social identity.

This, however, does not imply that we must simply accept antagonism as a fact of life and, for those whose identity is blocked, suffer in silence. Not at all. Indeed it is the discourse of rights that has provides an alternative to this 'crystallization' of antagonism. The institutionalization of identity struggles could be viewed as antagonisms-turned-agonisms such that identities can be negotiated away from a rigid and binary template. The idea is that since the signifier of fullness is empty, its contingent content can assume a multiplicity of forms. But we must also note that it would be wrong to conclude from this that the antagonism vanishes. Even if we assume that the relevant parties to the dispute are ecstatic about its proposed resolution and implementation, the only thing we can say is that the antagonism has been displaced, repressed even. Why? Because, as we have seen, all identity is traversed by antagonism; all identity is based on a radical exclusion. Since the 'solution' (which pertains to content) and the 'problem' (which pertains to the filling function) are incommensurable, the hegemonic domination of one particular content over another necessarily implies the exclusion of others. We can say, therefore, that with the resolution of a dispute the political identity, whose (particularized and contingent) constitutive outside was made visible through dislocation, becomes a social identity. The constitutive split of identity is thereby displaced and no longer visible.

Now we can also understand why the irruption of the real (antagonism) coincides with the return of the repressed and why this 'return' cannot be predicted in its specificity. We have seen how social identity relies on exclusion. It is this exclusion that comes back to haunt the 'taken-for-granted' identity due to the uneven development of the social. But since the exact status of this exclusion is always retroactive; and since this exclusion can only be apprehended with the currently available symbolic resources; and since there is an unbridgeable gap between the real nature of the unconscious Other
and the mode of its symbolization; it stands to reason that the 'return' is not of something whose identity has remained intact; indeed it would be incorrect to conceive of it as an identity, for this could only appeal to a transcendental teleology: an excluded A emerges later as A. Rather it is something which disrupts identity; which disrupts the sedimented social. And in order to do so, it cannot be of the social or the of the spatial which is characterized by uninterrogated repetition (as in the judicial practice of citationality). It must be of an (ungraspable) temporal nature. We can now, perhaps, understand Laclau's link of the temporal to dislocation. (NR, 41–42) Does not the occurrence of structural dislocation announce the 'return' of the repressed? Does it not mark the emergence (the making visible) of an antagonism whose particular and contingent configuration retroactively evidences its presence?

Let us now return to our example concerning the dispute over the noise emanating from a neighbouring industrial plant. We see, there, how the particular description of the 're-surfaced' antagonism cannot be determined in advance, nor during its constitution. What does limit the outcome are the available subject-positions that may be appropriated and the way the political struggle gets played out. Thus, the wounding and hurtful antagonism could have manifested itself in a contest between the 'socialist' and the 'capitalist' rather than the 'environmentalist' and the 'industrialist'.

Or, to take the case of national identity, a 'return of the real' in the form of nationalism will not (and cannot) designate the return of a pre-constituted and unadulterated identity. Rather, this 'new' nationalism will be critically altered by the social landscape and symbolic resources of the day. A resurgence of German nationalism, for instance, will necessarily be tempered by the new context of a European community which may put “some important limits on the development of a purely xenophobic politics.”82
The point is that by recognizing the real gap separating the final outcome/decision from its possible contents/reasons means that the horizon of possible outcomes expands as does the system’s freedom. We should also point out that the antagonistic site, whatever form it assumes, will also serve as a focal point for collective identity. In other words, individuals will be linked to one another inasmuch as they share common subject-positions (signifiers) which, in turn, give rise to their respective social movements. And finally, we should remind ourselves that each and every identity is overdetermined and constantly being subverted. There is no such thing as a fully-sutured and autonomous identity which is discoverable and which seeks to be adequately and transparently represented. This is nothing but one version of the liberal myth. Rather, as we have just seen, identity is always in motion, constantly becoming, manifesting a persistent want-to-be whose lure is the objet petit a and whose game is the dialectic of desire. It is this shift in emphasis that Wendy Brown suggests is needed to invigorate the stale liberal conception of identity politics and infuse it with an ethics of desire:

What if we sought to supplant the language of “I am” -- with its defensive closure on identity, its insistence on the fixity of position, and its equation of social with moral positioning -- with the language of reflexive “wanting”? What if it were possible to rehabilitate the memory of desire within identificatory processes, the moment in desire -- either “to have” or “to be” -- prior to its wounding and thus prior to the formation of identity at the site of the wound? What if “wanting to be” or “wanting to have” were taken up as modes of political speech that could destabilize the formulation of identity as fixed position, as entrenchment by history, and as having necessary moral entailments, even as they affirm “position” and “history” as that which makes the speaking subject intelligible and locatable, as that which contributes to a hermeneutics for adjudicating desires? If every “I am” is something of a resolution of desire into fixed and sovereign identity, then this project might involve not only learning to speak but to read “I am” this way, as in motion, as temporal, as not-I, as deconstructable according to a genealogy of want rather than as fixed interests or experiences....

.... [T]he replacement -- even the complex admixture -- of the language of “being” with “wanting” would seek to exploit politically a recovery of the more expansive moments in the genealogy of identity formation. It would seek to reopen the moment prior to its own foreclosure against its want, prior to the point at which its sovereign subjectivity is established through such foreclosure and through eternal repetition of its pain.
Identity and Power: Structural Constraints Revisited

Let us recall our discussion of power from chapter two. There, we found that for power to exist it could not be absolute. Only partial power could account for the duality power/legitimacy. This was because, as we saw, absolute power implied a single identifiable source in the social that was predictably and ineluctably responsible for the identity of that social. Any semblance of resistance could only be attributed to a temporary misperception of the objective laws of history, a perception often dismissed as false-consciousness. We were thus forced to conclude that power, in order to be conceived as power, had to operate against the background of a countervailing force (and from which legitimacy could spring). We also noted that power was linked to the idea of repression. Power, in other words, manifested itself through the limitation or exclusion of possible alternative historical trajectories. Legitimacy, on the other hand, took its cue from a sense of what possibilities could and ought to be considered and/or be given effect to.

Now we can link our concept of power to structural constraint as we had conceived it in chapter two, namely as repetition. What is structural constraint if not a notion that issues forth from that which escapes the totalizing tendencies of a dominating force? Structural constraint is a constraint whose effect is to limit the available floating signifiers that may incarnate an ideal fullness. And what is repetition but an extreme version of this constraining process?

What must be remembered, though, is that the idea of 'constraint' makes sense only against the background of 'missed' opportunities; in other words, when there is a sense of structural dislocation manifested in the emergence of the subject as lack; or, to put it another way, when the repressed unconscious (which is constitutive of the
dominating force/identity) erupts as the return of the real (antagonism). Thus, for example, intellectual property law can be conceived as constraining structures inasmuch as they attempt, in advance, to control the circulation, and contexts, of signifiers in the public domain. This means that the insertion of these signifiers into ‘alternate’ contexts is prohibited and thus excluded. Indeed, as Rosemary Coombe notes, “[t]he twentieth century has witnessed a massive expansion of legal protection for these forms of property because intellectual property has become the most important site of capital growth and investment in consumer societies.”

She examines how, in the US, the enforcement of proprietary rights by the US Olympic Committee over the signifier ‘Olympic’ was used to exclude the gay population from promoting the ‘Gay Olympic Games’; and how, in Canada, the non-enforcement by public authorities of their property rights over the depiction of RCMP officers had a similarly exclusionary effect upon minority Sikhs who were portrayed in racist RCMP contexts. But no matter how powerful these structures of prohibition are, some form of resistance will by definition always exceed their grasp and ‘return’ to haunt a protected symbol. And this is most forcefully exemplified by Coombe, with her discussion of trademark rumours. There, she gives an account of how anonymous rumours circulating ‘illegal’ appropriations of a symbol can be anathema to even the most ‘powerful’ of corporations. Thus, in one of her examples, she describes how in 1985, Proctor and Gamble (whose products include Tide®, Crest®, Ivory Snow®, and Pampers® and whose daytime TV advertisements gave rise to the term ‘soap opera’) had to jettison its 135-year-old man-in-the-moon logo after spending millions of dollars in an attempt to contain the fallout. From this perspective, we can also note here the significant intellectual property issues that will have to be addressed as a result of a rapidly expanding world-wide communications network (as in Internet).

Thus, Coombe argues, rumours can be conceived as “practices that seek to make the power behind the sign both visible and audible.” And can we not see the relevance of our concept of power to this particular form of ‘exposure’? For power denotes an
attempt to foreclose the range of possible meanings; and rumours operate to make visible the repressed Other(s). And now, perhaps, we can attempt to better situate that problematic and elusive notion of ‘power relation’. Earlier, we noted how every identity, and hence every relation (for all identity is relational), is constitutively split, traversed by an antagonism. However, for the most part, this is concealed through a repression whose other side is the unrippled facade of the sedimented social. Now, occasionally, due to the uneven development of the social, structural dislocations are felt and attempts are made to fill the perceived missing link. It is in these contexts that we have occasion to talk of ‘power relations’. In other words, the idea that a relationship deserves to be described as a power relation only arises after the contingent nature of the social has been exposed, i.e., when the social has been transformed into the political, at least from the perspective of the antagonized force. A power relation, therefore, describes the situation in which one force attempts to assert its hegemony while another questions it and posits itself as an alternative. Thus, structural constraints refer to the power apparatus which operates to diminish the range of competing alternatives. In this sense they function as a kind of Foucauldian disciplining mechanism which, though it “works through language, is not reducible to language”87: it is discursive, in the Laclauian sense. They constitute something that the dominant force may have a vested interest in, but they also constitute something that the dominant resisting force may have a vested interest in. From here, the next step can only be to examine a specific case in its particular context. To say, for example, as Cornel West does, that poststructuralism is limited because “if we don’t talk about the material resources, and bodies and land and labour and corporations, then we remain inscribed within a very, very narrow kind of discourse”88 may be politically mobilizing, but is analytically unhelpful and misses its poststmarxist mark. Why? Because, as Judith Butler points out in her response to his impassioned plea, what is of relevance in decision-making is not the highly abstract, not to mention idealistic, existence of material resources beyond the realm of discourse. What is relevant in the
public domain is how ‘material resources’ as a signifier gets caught up in the general politico-symbolic network out of which a decision will precipitate.

And the buck stops here. It is unhelpful, in other words, to suggest that the way the signifier gets caught in the signifying network is itself a product of material resources. If anything has come out of our discussion on the logic of the signifier, it is the non-founded and contingent character with which a signifier’s identity is (precariously) established. In other words meanings can only be tautologically self-referential, and will remain ‘intact’ so long as their negative supplements (constitutive outsides) remain repressed. But let us not be misunderstood. We are not denying that references to current (mal)distributions of material resources make powerful appeals to an evolving common sense influenced by a democratic logic of identity that is infiltrating more and more areas of life. Rather, we are arguing that structural constraint derives from the sedimented discursive structures that we rely on, not from material structures which lie beyond discourse. Whole new vistas of possibility are opened up by genealogical practices whose aim is to loosen the knots of these structures. But questions of what exactly the form of the structures is, how deeply ingrained it is with respect to a specific issue, and what actions to adopt with a view to a desired outcome, can only be of a strategic and political nature, dependent on a particular context.

**Identifications in Legal Discourse**

Let us now look more closely at the domain of law. The role of legal discourse in the process of identification becomes obvious when such questions have to be decided as ‘Who is the parent of this child?’, ‘Is this person a murderer?’, ‘Who is the owner of this property?’, ‘Are these two (heterosexual/gay/lesbian) persons married?’, etc. How can we exemplify the relation between identity and power structures here? Let us take the
example that Martha Minow invokes regarding legal paternity tests. We find here that just as anthropologists' questions and descriptions of 'other' cultures influence, modify, and create new identities, so too do legal questions and descriptions concerning legal claimants.

In the 1989 case of *Michael H. v. Gerald D.*, the US supreme court upheld a California law which *irrebutably* presumed that a child born of a mother living with her husband is also the child of that man. This law, to be found in both statute and common law form, stemmed from a desire to eliminate uncertainty at a time (over a century ago) when alternate means of reliable testing did not exist. The upshot of the case was that the court ignored blood tests showing a 98.07% paternity probability that contested the irrebuttable presumption. The purpose of our account here is not to declare the outcome 'incorrect' or 'correct'; nor is it to debate the merits and demerits of the judiciary for the kind of political decision-making that is taking place; rather, it is to show how legal structures, and specifically, its practice of citationality operates to entrench the *status quo* instead of reopening the issue to debate in the face of new cultural and technological developments.

In what may be considered a perversity of logic, it is the *legal definition* that aspires to establish the *nature* of paternity. "Identity is treated in the opinion as natural, discoverable, and unable to be changed. Even when acknowledging that alternative understandings of family identities are possible, the plurality converts the issue into one that can be answered by reference to an unchanging source of evidence: 'the historic practices of our society' which recognize a protected family unit." Take note of the authority of Justice Scalia's words which completely foreclose debate and so the possibility of alternative futures: "California law, like nature itself, makes no provision for dual fatherhood."
We see, therefore, how we can launch a critique of the blind repetition that merely reproduces institutional power structures and whose perverse justification is the repetition itself.

Treating as conclusive the presumption that the husband of the mother is the father of the child allows the plurality to reinforce structures of social and institutional power that have selected some family forms as preferable and thus recognizable. Most importantly, the plurality seeks to cover its own tracks despite its critical power to choose what kind of family roles to permit, and even what kinds of debates over family roles to countenance.93

Moreover, we should take cognizance of the fact that such a critique, though necessarily tied to a background of possible alternative modes of existence, need not be exclusively tied to one. We have, in other words, another way of conceiving the Lacanian ethic of the real in which we resist the lure of the filler (petit object a). The idea is to keep the split alive between the empty space of power and the particular content which will incarnate it. And this is what distinguishes the traditional marxist from the radical democrat. Whereas the latter attempts (for one cannot ever be totally successful) to keep a distance between her political project and her onto-epistemological project, the former short-circuits this separation.

Let us follow Rosemary Coombe by taking another example of the process of identification, this time from administrative law, copyright law, and the law of cultural property. Here, we will be concerned with the construction of native identities in the context of these legal structures. In Canada, the lives of native Indians had, since 1876, been governed by the relevant Indian Acts which gave the Indian Affairs Department "sweeping powers 'to invade, control, and regulate every aspect of aboriginal life', curbing constitutional and citizenship rights in the paternalistic guise of Indian protection, while suppressing aboriginal languages, culture, and collective identity."94 There is probably no one today who would deny the tragic consequences (alcoholism, drug abuse,
child abuse, etc.) that a severely aggressive assimilation policy\textsuperscript{95} can have, especially if made legal and backed by stupendous state resources.

We have the paradigmatic case of the Indian as (Canadian) Society's symptom. In other words, the prevailing mood betrayed a totalitarian ideology which suggested that but for the Indians, we would have a harmonious society. The ideal was a society in which Native identity had been extinguished. It is no surprise to find that Indian Affairs "Departmental policy has historically labeled aboriginal peoples a 'problem' whose cultural and social idiosyncrasies preclude smooth absorption into society."\textsuperscript{96}

Today, we have moved away from state-sanctioned discrimination in which Native ceremonies (Potlatch, sweat lodge, sun dance, etc.) could be capriciously and legally banned and into what we could call official state-neutrality. And, as we learned in our discussion of the rights discourse, \textit{de jure} state neutrality in the public realm does not preclude \textit{de facto} discrimination in the private realm. Hence, we come to contemporary (private) copyright and cultural property laws which attempt to freeze the meanings of Native narratives and object-artifacts out of their dynamic, diachronic, and evolving culture. These meanings are then reinserted into a static, essentialized, synchronic, and market-driven Culture. In this way, the law operates to prevent such stories and objects from operating as dynamic centres of collective-cultural identification, and which are just as important as Aboriginal Title claims which assert a territorial-cultural relation. We have reached the ironic position in which a Native aboriginal claiming to be better situated than a non-Native to tell their stories can be "accused of trying to shackle the artistic imagination of authors and as advocating censorship, but what these critics do in making such responses is to reinscribe Native peoples as objects of human Culture, rather than authorial subjects in their own right -- contributors to Culture, rather than merely objects of it -- capable of the expressive work that defines us as human, rather than merely serving as sources of ideas for the expressive works and proprietary claims of others."\textsuperscript{97}
The aim of this example was not so much to judge the contemporary legal framework regarding Native identity, but to show how every sedimented, synchronic structure, legal structures included, are based on a radical exclusion of an Other; and that an appeal to the historicity of that structure is necessary for a more democratic dialogue between that structure and its returned repressed. In other words, greater sensitivity to, and respect for, the historical moment of repression will assist in transforming what could become a brittle antagonism into a more fluid agonism. And, of course, this corresponds to the second step of Zizek’s critique of ideology, namely the moment of ‘crossing the fantasy’.

On Representing Interests

It might be useful, here, to concentrate a bit more on the role of the lawyers and judges and how they relate to the process of identification. First, however, let us recall that the impetus to identification comes from the lack at the centre of our subjecthood. We appropriate a signifier which serves as an identifying mark. The signifier thereby represents our lack. Now, if the lack is the defining characteristic of the subject, we can understand why identification is necessarily alienating rather than regrettably alienating as Gabel would have us believe. For in order for a trait to represent the subject, it cannot, by definition be the subject; otherwise the representative and the represented would collapse into each other in a puff of transparent self-identity. In other words, the filling function can only take place on the basis of a certain opacity between the filling (of the lack) and the filler. They are radically incommensurable, as we have already seen. The filler can only be externally-contingently related to the filling function, which means that the filling function can be (partially) fulfilled by a variety of potential fillers.
Enter the lawyer. Does she not, like a congressman or member of parliament, *represent* the subject for another signifier? Let us be more precise. What happens when a customer enters the office of a lawyer? Let us answer the question of why this person enters the office in the first place. Is his visit not the result of a certain unease that has come to his attention? Does he not feel, in some way, that he could be 'better off'? And what is this if not an indication of the emergence of the subject as lack? The social structure, at least as he experiences it, has been dislocated. His interests, which make up part of that structure, have a specific history developed over a lifetime of alternating periods of sedimentation and reactivation, and are now somehow out of joint with the rest of the social structure. In other words, a series of social relations have transformed themselves into power-political relations. In this view of things, the lawyer's function is to present her client with a variety of surfaces onto which his demands may be inscribed.

We see, therefore, that even at the consultancy stage, the interests driving the desire to fill the lack are being transformed by the adoption of one or another of the 'political' options offered. Whatever the motivation, whether money or principle, the legal discourse operates as a pool of floating signifiers one of which may end up as a prominent identifying trait of a client and others who subsequently adopt that identity. And as for the identity of lawyers and judges themselves, let us not assume that they are unaffected. As Minow remarks, "[l]awyers and judges constitute themselves in the course of defining others."98 But let us also not forget that they have their own sedimented interests, and that these may have the effect of downsizing the pool of floating signifiers available to claimants which, in turn, can lead to a suppression of alternative options and the manifestation of powerful structural constraints. It is in this sense that Minow can critique the characterization of identity questions in the legal arena as frequently "crude simplifications demanded by the either/or and yes/no quality of questions about identity: is he the father or not, is she assimilated or not? Any answer to the question suppresses a third [or more -- LJG] and often plausible alternative."99
As we have said elsewhere, critiques of structural constraint can only operate against a background of an alternative possibility or set of possibilities and must be confined to the particularity of the case at hand. The idea is that by becoming more fully aware of the constituting and constitutive character of legal representation, lawyers and judges may begin to glimpse wider and wider horizons of possibility.
Notes to Chapter Three

2 Marx, *supra* at 224-225.
5 Fudge, ‘Public/Private’, *supra* at 494.
7 Fudge, ‘Public/Private’ *supra* at 489.
8 Similar cases should be treated similarly, and dissimilar cases should be treated dissimilarly.’
9 Minow, Martha, *Making All the Difference* (Ithaca: Cornell University Press, 1990) at 50-74. See also Schneider, *supra* at 634-635.
10 Of course, we must be alert to the fact that, from an anti-essentialist perspective, an attempt to establish similarity or difference between the sexes in an all encompassing or a *a priori* fashion is theoretically unsound, for it presupposes the full constitution of the identities ‘man’ and ‘woman’ subject to comparison. Rather, we have a “multiplicity of social relations in which sexual difference is always constructed in very diverse ways and where the struggle against subordination has to be visualized in specific and differential forms.” (RP, 78)
11 Fudge, ‘Public/Private’, *supra* at 513.

State action, typically in the form of legislation or administrative action, is directly involved in either constituting or ameliorating women’s subordinate position in the following four areas:
1. Protective or remedial labour legislation;
2. The legal recognition and regulation of a specific type of family;
3. Legislation designed to protect women from sexual violence or victimization; and
4. The legal regulation of reproduction.

Fudge, ‘Public/Private’, *supra* at 494.

12 Fudge, ‘Public/Private’, *supra* at 523. In the context of legislation designed to protect young women from sexual violence (s. 146 of the Criminal Code), the argument is that “since females cannot be charged with the analogous offence of having intercourse with a male under the age of fourteen years, section 146 discriminates against men on the basis of sex in a manner which cannot be justified under... the Charter”: Fudge, ‘Public/Private’, *supra* at 524.
13 Fudge, ‘Public/Private’, *supra* at 528.
14 Crenshaw, ‘Race’, *supra* at 1380.
15 Goldfarb, *supra* at 691.
16 Fudge, ‘Public/Private’, *supra* at 496.
17 Fudge, ‘Public/Private’, *supra* at 523 and 550.
18 Coombe, Rosemary, ‘The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy’ (1993) 6(2) Canadian Journal of Law and Jurisprudence 249 at 270. The “call to make judgments in context often seems misleading if it implies that we could ever make judgments outside of a context; the question is always what context matters or what context should we make matter for this moment...[I]n many contemporary political and legal discussions, the demand to look
at the context often means a demand to look at... structures of power”: Minow, Martha, and Elizabeth Spelman, ‘In Context’ in Brant, M., and W. Weaver, eds, Pragmatism in Law and Society (Boulder, Co.: Westview Press, 1991) 247 at 247, as quoted in ibid. at 271. What is worth keeping in mind, however, is that the very issue of context can only arise as a consequence of an awareness of the contingency of a specific decision, i.e., that an outcome could have been otherwise.

Of course the issue arises whether the court is an appropriate political forum for the resolution of such matters. Perhaps it is time to consider that question. Perhaps it is also time to consider which forum is best suited for the discussion of the issue of where it is best to debate the issue of whether the court is an appropriate venue..... How can we possibly answer these impossible questions? By referring to Lacan’s typology of discourses, of course. So, what stops this seemingly endless hysterical doubting? The foundationless act (decision) of the master.

See, for example, Fudge, Judy, and Harry Glasbeek, ‘The Politics of Rights: A Politics with Little Class’ (1992) 1 Social and Legal Studies 45 at 65-66.

Fudge and Glasbeek, supra at 64.

22Fudge, ‘Public/Private’, supra at 534.

23Sumner, Colin, ‘The Rule of Law and Civil Rights in Contemporary Marxist Theory’ (1981) 9 Kapitaliste 86 at 89. We also find, unfortunately, that many such authors avoid addressing the reasons why any other mode of production would preclude inequities. See Herman, Didi, ‘Beyond the Rights Debate’ (1993) 2(1) Social and Legal Studies 25 at 31 who, in criticizing Fudge and Glasbeek for seemingly suggesting that “only ‘class struggle’ is worthy of the word ‘transformative’”, asserts that they “give no indication that a new mode of production will not also exploit ‘historical lines of fragmentation’; indeed, their analysis might even suggest this would be inevitable.”

Examples are those belonging to systems of socialism, capitalism (wage labour), and feudalism (serfdom).

25See, for example, Milovanovic, Milovanovic, ‘Karl Marx: Law in a Political Economy’ in his A Primer in the Sociology of Law (New York: Harrow and Heston, 1988) at 61.


Alan Hunt, for example, believes in no such necessary connection. He does suggest, however, that particular ideological values might have “an elective affinity or homologous relationship to the legal form.” Following Hirst, he prefers to operate at a high level of abstraction in offering a description of the forms of a capitalist society: ‘reification’ (separation of the juridico-political realms from the economic), legal subjectivity (separation of legal status from political or economic status), and the legal subject (a human or organizational entity vested with legal rights): ibid.

29Weitzer, supra at 147. As we will see later, the manner in which this question is posed already betrays an essentialist tinge.

30See, for example, Feinman, Jay, ‘The Meaning of Reliance: A Historical Perspective’, (1984) Wisconsin Law Review 1373 at 1385-1389, who argues that the contract doctrines of reliance and unconscionability have the effect of particularizing (anti-universalizing) the decision-making process, of recognizing that all legal subjects are not usually substantively equal, and of fostering the value of reliance and hence community morality.

31These refer to ideologies that operate on a level of ‘externality’, in the sense that they function to contextualize law in the grander socio-political scheme of things. The ideologies that seem to be dominating in our present socio-cultural configuration consist of a mixture of beliefs associated with the law: impartiality and the rule of law, awe, majesty, mercy, magic, merit, irrelevance of socio-economic background, etc. Ideologies of law are, on a certain level, inseparable from ideologies in law, and are propagated through the practices of, among other institutions, legal education, the legal profession, and the judiciary.

32These refer to ideologies that operate within the discourse of law. They consist of the forms of law as they adhere to such doctrines as contract and property.
33 See Sumner, Colin, Reading Ideologies: An Investigation into the Marxist Theory of Ideology and Law (New York: Academic Press, 1979) at 269-270, who suggests that, although the law reflects a whole plethora of perspectives and discourses, it is the current dominating ideologies of, and in, law that operate to exclude and disadvantage other voices. Karl Klare talks of the liberating effect that such deconstructive activities have. He argues that an understanding of the processes of ideological struggles frees us up to consider and advocate new ideologies and forms of law. He argues that law-making, as it presently operates, is a mode of domination because of its ideological and instrumental (repressive -- as in sanctions -- and facilitative -- as in dispute resolutions) functions: Karl Klare, ‘Notes and Commentary: Law-Making as Praxis’ (1979) 40 Telos 123 at 133-135.

34 Marx, supra at 235.

35 Marx, supra at 237.


38 Williams, Patricia, ‘Alchemical Notes: Reconstructing Ideas from Deconstructed Rights’ (1987) 22 Harvard Civil Rights-Civil Liberties Law Review 401 at 405. Indeed, this observation constitutes the starting point for her critique of the CLS movement (David Kennedy being a notable exception: see Schneider, supra at 596) which seems to assume successful, complete, and full adoption of the liberal-capitalistic and alienating conception of rights by all, including marginalized groups. Indeed, Williams suggests the possibility of a different meaning of rights not only through its disassociation with the idea of alienation, but also through its association with a positive connotation and welcoming of the distancing effect of rights (Williams, supra at 417). This CLS move involves the sedimentation of the link between form (rights) and the mode of production (capitalism): see Schneider, supra at 595. It ignores not only the admittedly weak dispersive tendencies within the liberal discourse itself, but the more powerful subversive appropriations taking place at the fringes of society. Of course, this is not to imply that such marginal signifier-signified slippages and counter-hegemonic reifications are sufficiently powerful to effect a timely dissolution of the mainstream edifice. Rather, it is to highlight the importance of context in the attribution of meaning to particular symbols.

39 Goldfarb, supra at 704.

40 Williams, supra at 410.

41 Williams, supra at 411.

42 Goldfarb, supra at 689.

43 Schneider, supra at 612. She also discusses Minow’s “reconstructive visions of rights shaped by a conception of self... [that locates] each individual within social networks [where] membership helps constitute the ‘I’, and belonging is essential to becoming”: Schneider, supra at 619. It becomes obvious then, that to be marginalized, one need not be in a minority in so far as minority connotes numbers of individuals. It brings into focus the power that the liberal-conservative ideology has in keeping widespread dissafction subdued through a refusal to listen to claims and the isolation that accompanies that.

44 Schneider, supra at 616, relying on the work of Carol Gillian.

45 Schneider, supra at 620.

46 Goldfarb, supra at 698.


48 Ibid at 283.


50 By traditionally understood, we mean historically situated in the post-war era, for if “we look at the writings of earlier liberals, especially Mill, Green, and Hobhouse, a different view emerges. They emphasized the importance of cultural heritage for individual autonomy, and hence they had a different view about the salience of cultural membership”: ibid. at 200.

51 Ibid. at 183.

52 Ibid. at 188-194.

53 Ibid. at 196.

54 Schneider, supra at 595-596.

56 Schneider, supra at 599.
57 Here, we are using the word indeterminacy in the sense of radical ambiguity, not just equivocation. (WES, 167-168)
58 Schneider, supra at 630-632.
59 Smart, ‘The Woman of Legal Discourse’, supra at 39. Carol Smart, in Feminism and the Power of Law (London: Routledge, 1989), outlines how the law, particularly rape law, reflects cultural (largely ‘male’) values about female sexuality and thus Womanhood. She shows how the concepts of consent and pleasure operate in the context of a rape trial to sexualize (and trivialize) women’s bodies. Thus, it is not unusual to see even our heroes make matter-of-fact statements, interrogations of which are implicitly dismissed. To quote Lord Denning: “No matter how you may dispute and argue, you cannot alter the fact that women are quite different from men. The principal task in the life of women is to bear and rear children: ... He is physically the stronger and she the weaker. He is temperamentally the more aggressive and she the more submissive. It is he who takes the initiative and she who responds.”

The rape trial usually turns on the classification of a series of events as pointing to consent or non-consent (to sexual intercourse). On its own this seems harmless. However, it is the process that is followed in the context of our legal institutions that will determine the facts that are relevant and the interpretations of those facts. It constitutes law’s role in this particular truth game and its rules of inclusion and exclusion reveal (from a feminist perspective which tries to establish an equivalential link to conditions of oppression to the principle of equality and liberty for all) deeply seated gender biases.

For example, up until recently in the context of rape trials, the sexual history of the woman was held to be relevant and therefore admissible as evidence, but not that of the man. But even in the absence of such common law rules, the attitudes which permitted the construction of such rules still linger on. As Carol Smart states in her Feminism and the Power of Law: “[w]hilst the rape trial deals with the category of Woman... it can also be said that the trial deals with and celebrates the category of Man... Male sexuality and its satisfaction is always its own excuse or justification. Being a sexual predator is regarded as normal, even desirable for men. Sexualizing all women is equally regarded as natural.”

Also, Smart shows that in practice “a woman must show, beyond all reasonable doubt, that she was unwilling to have intercourse and that she could not possibly have enjoyed it.” The intense, unrelenting, and ‘non-relevant’ questioning directed at women during the trial have caused MacKinnon and others to declare the event a ‘second violation’ (in the pornographic sense of re-creating a pornographic or sexual spectacular). Further complicating matters is the fact that certain categories of women (as in prostitutes, or women of colour) seem to have a much greater chance of falling on the consent/no consent dichotomy.

In a recent bid to counteract such misogynist tendencies in Canada, Madame Justice L’Heureux-Dube (Seaboyer, 1991), following Holmstrom and Burgess, attempted to list a few common myths and stereotypes governing beliefs and behaviour of the public in general, but which circulate with equal or even greater frequency in the police, the legal profession, and the judiciary. Here are some examples.

1) Struggle and Force: Woman As Defender of Her Honor. There is a myth that a woman cannot be raped against her will.
2) Knowing the Defendant: The Rapist as Stranger.
4) General Character: Anything Not 100 Percent Proper and Respectable, eg., drinking or on welfare, could be used to discredit.
5) Emotionality of Females. They must be visibly upset afterwards.
6) Reporting Rape, ie., women are expected to be able to report incident immediately (cf. recent complaint exception to hearsay rule in evidence).
7) Woman as Fickle and Full of Spite, ie., women often seek revenge on past lovers.
8) The female under Surveillance: Is the Victim Trying to Escape Punishment? She got caught, and now she wants to get back in the good graces of whomever’s surveillance she is under.
9) Disputing That Sex Occurred. Women are thought to fabricate the sexual activity.
10) Stereotype of Rapist is one who leaps out of bushes. A corollary of this myth is the belief that rapists are not ‘normal’ and are ‘mentally ill’.

However, a recent BC supreme court decision of (R v. Letendre [1991] BCSC) is a particularly sobering example of how traditional stereotypes operate to cloud the dynamics of a sexual encounter, thus producing the highly reified category of woman. It demonstrates a still-pervasive and omnipresent ‘male-
centred' approach to sexual assault. In this case, the issues were, under a s.271 criminal code charge, 1) whether the crown has proven beyond a reasonable doubt the complainant's lack of consent; and 2) that lack of consent was conveyed to the accused. The accused did not give evidence, so Hood, J., relied mainly on facts determined through examination-in-Chief and cross-examination. The main reasons for not convicting the accused were:

1) Complainant did not explicitly tell accused to stop. "In my opinion, in the interests of both participants, it is one which demands clear and unequivocal communication between the parties."
2) Complainant did not physically stop him, though she was apparently free to do so. Indeed she seemed to volunteer to assist him in certain circumstances.
3) The grabbing of her throat, and the putting of her hands behind her back were not forceful enough to trigger the concept of 'violence.'
4) Complainant's credibility was questionable due to slight alteration of story after the break.
5) Complainant's fear (whether due to overall context, or 'wide-eyed' expression, or resistance to 'assailant's' neck) was either unfounded or exaggerated.
6) Accused's conduct, "including seeking her help to remove her pants and otherwise, his affectionate kisses, his response to her inquiries that he was doing it because he really liked her, his suggestion that they go into the bedroom and his comments 'isn't this much better' and 'isn't this good or much better' does not seem to depict a man who was aware that he did not have the complainants' consent but nevertheless persisted despite that risk.

Though it is always hard to convey the mood of a judgement through summary points, this case clearly demonstrates complete ignorance of the dynamics of such a sexual encounter. It constitutes almost a text-book example of a judge steeped in stereotypes of the sort enumerated by L'Heureux-Dube. Her emotional state was ignored (i.e., did not believe that she 'was scared to death'), indeed he [Hood, J.] stated that there was no basis for her fear, as if unwanted sexual contact did not constitute such evidence. The difference in physical strength between the complainant and accused was not taken into consideration; nor was the question of what might have likely happened if she had attempted to resist more forcefully. It was clearly a situation where the judge ought to have taken judicial notice of relevant social facts.

[Schneider, supra at 595.]

[See also Fudge, 'Public/Private', supra at 534-535.]

[62] I.e., that they are lazy, unintelligent, immoral, ignorant, criminal, shiftless, lascivious. In short everything that the white person is not. See Crenshaw, supra at 1369-1370.

[63] Crenshaw, supra at 1380.

[64] Crenshaw, supra at 1380.

[65] Crenshaw, supra at 1382-1383.


[67] Copjec, Joan, 'The Subject Defined by Suffrage' (1993) 7 Lacanian Ink 47 at 53-54. As to this grain in the midst of language, she continues:

The grain "has no civil identity, no personality;" it is in no way equivalent to the "accent of an era, a class, or a regime." In brief, it is "not personal; it expresses nothing" of the subject who speaks [quoting from Roland Barthes, 'The Grain of the Voice,' in Image/Music/Text, Stephen Heath., trans. (New York: Hill and Wang, 1977) at 182].

The grain merely marks the limit of language and thus of our knowledge of the other. But although the grain is not the index of a particularity with any content, social or otherwise, it does serve as index of a particular absolute, it does mark the statement as belonging to its speaker uniquely. For by adding our own ignorance to the statement, we suppose its speaker to enjoy a special relation to language, or, to put it differently, we suppose an enjoyment inaccessible to us. This supposition converts all his statements into manifestations of this inaccessible jouissance [and converts the speaker into a subject supposed to enjoy: SO, 186-187].

Ibid. at 55.
As Renata Salecl notes: "The Kantian subject as an empty form of apperception always needs another subject to ground its identity: as long as I am an empty, split subject, what I am is always linked to what the Other (in the sense of another human being, as well as the symbolic order) thinks that I am." The point is that the rights of another individual do not just limit our rights but also define our rights themselves. When we perceive another individual as someone who has rights, we recognize him/her as the agent who defines what we are, what kind of rights we have": Salecl, Renata, ‘Woman as Symptom of Rights’ (1993) 12 Topoi 89 at 90.

See Salecl, ‘Woman as Symptom of Rights’, supra at 97, where she talks of the distinction between exist and ex-sist. Indeed, it is because of the abstract and undefinable character (i.e., the inexistence or existence) of rights (or, more precisely, of the right to have rights) that they cannot be reduced to a particular historical configuration, as historicists would prefer. "This means that they cannot be genealogically analyzed as Foucauldians would like, nor can their effects be measured or controlled. The concept of human rights retains its potential for critique of actual historical circumstances as long as it remains an empty, universal idea. Thus it is just as mistaken to place the idea of human rights in a specific historical context (which historicists try to do) as it is useless to search for some intrinsic human nature at the core of the idea of human rights (which is what natural rights theory does)": ibid. at 92.

In recent decades American society has experienced a hyperinvention of rights and an inflation of legal claims. Some of the rights being granted are even as absurd as the case where the town of Malibu gave dolphins rights equal to those of people": Salecl, ‘Woman as Symptom of Rights, supra at 98, note 3.

It is in this sense that we can say that “[i]n spite of the fact that we have rights, a right that would express the notion of right itself does not exist [i.e., is real]. All we can do, in this regard, is to perpetually invent new rights and search in vain for a right that would affirm us as non-split subjects.” Salecl exploits the Lacanian distinction between need, demand, and desire to remark that “[i]t is never possible to list all rights, just as it is never possible to fill the demand for their total possession. As a result of all of this it appears that rights are not so much linked to demand as they are to desire: they are akin to that surplus of demand over need because of which demand always remains unfulfilled”: ibid. at 95.

Of relevance here is also the debate concerning who should have a legitimate decision-making capacity: the layman or the expert.

Identity politics has often been identified by the right with the label ‘political correctness’ which is then chastised for being authoritarian and dogmatic. The irony of this move by the right is not missed by Joan Scott. “‘Political correctness’ is the label that has been attached to any program or position that attacks or calls into question the status quo. Coined by the left as an internal criticism of moralizing dogmatisms, the term has been seized by the right and used to disqualify all critical efforts.... Demands for change in the name of tolerance, fairness, and justice are, under the ‘p.c.’ label, described as dangerous orthodoxies, attempts to impose thought control on otherwise benign individuals. In the name of defending the individual’s right to think and act as he pleases, the conservative ideologists protect existing structures and practices from all critical scrutiny and even moderate attempts at reform.” And “[i]f ‘political correctness’ is the label attached to critical attitudes and behaviour, ‘multiculturalism’ is the program it is said to be attempting to enact”: Scott, Joan, ‘Multiculturalism and the Politics of Identity’ (1992) 61 October 12 at 13.
Chapter Three: The Law and Politics of Rights and Identities

[83] See also Mouffe, Chantal, ‘Discussion’ (1992) 61 October 33 at 41.
[86] Ibid. at 427.
[95] Take, for instance, the following examples of ‘statesmanship’:

In 1887, Sir John A. Macdonald declared that “The great aim of our legislation has been to do away with the tribal system and assimilate the Indian people in all respects”. In 1920, Superintendent-General Duncan Campbell Scott was even more to the point: “I want to get rid of the Indian problem... Our objective is to continue until there is not a single Indian in Canada that has not been absorbed.”

Coombe, Rosemary, ‘The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy’, supra at 273. These aspirations were given sweeping effect. In a particularly insidious example, known as the ‘60s scoop’, almost all the children of a generation were taken from some reserves and placed in white adoptive families in Canada and the US. Indian status was also denied to children of Native mothers married to non-Native men: Ibid. at 275.

[99] Ibid. at 128.
CHAPTER FOUR: The Real as an Internal Moment of the Political

The Political: From Communitarianism to Liberalism to Radical democracy

We have just seen, in chapter three, how politics lives in the very midst of legal discourse, a now commonplace observation traced most prominently to legal realist, law and society, and CLS scholarship. But we have also seen, and this is the psychoanalytic contribution to the legal scholarship debate, how exactly this politics is played out, namely through a precise mechanics of identification.

Having brought to the fore the political nature of any kind of identity formation, it is perhaps incumbent upon us to examine more precisely the nature of the political, an inquiry which will necessarily entail our delving into political philosophy and a corresponding ethics of politics.

Our thesis in this section is that the traditional political philosophy debate among communitarians, liberals, and radical democrats can usefully be conceived as an externalized projection of the constitutive split of the signifier. We will argue that, though the (reversible) evolution of the political terrain from traditional communitarianism through traditional liberalism to radical democracy was contingent upon specific historical possibilities, its particular stages of evolution can be readily
explained by the logic of the signifier. In other words, through the prism of Lacan's logic of the signifier, we can discern first, the *conflation* of the two incommensurables constitutive of the split such that the filler and its filling function are collapsed into each other; second, the *distinction* between the particular contents and the universal (empty) form with an accompanying *reification* of the distinction; and third, the recognition of a constitutive exclusion which made possible the reification of the distinction and whose acknowledgment makes possible its *de-reification*.

Our thesis parallels, indeed draws upon, the work in this area of Chantal Mouffe and Renata Salecl. Thus, we can state this tripartite classification in at least two other ways. First, as a transition from the totalitarian-democratic logic of identity to its disruption of, and domination by, the liberal logic of difference to the radical democratic assumption of the irreducible tension of these heterogeneous logics (Mouffe). And second, as a transition from Lacan's dimension of imaginary closure to the dimension of symbolic difference to the constitutive nature of the real dimension (Salecl).

**Three Lacanian Orders: Im -- Sym -- Re...**

We shall begin by following Renata Salecl in remarking the correspondence between the triad communitarianism -- liberalism -- radical democracy and the Lacanian triad of the imaginary-symbolic-real.¹ First, however, let us attempt a clarification of the orders. For present purposes, we could say that the imaginary order is linked to the ideas of illusion, closure, transparency, identifiable and indisputable truths, attainable goodness, and happy endings. It subscribes, therefore, to a prioritization of the Good over the Just (or of substance over process, as implied in the advocacy of 'effective', 'real' freedom), and is often reduced to a utilitarian calculus of pleasures and pains whose aim is to satisfy the social good, and which is one and the same as the individual good.
(In other words, in this view, the individual good takes its cue from the substantive content of the social good).

In opposition to the imaginary order, the symbolic pertains to difference and fiction. Here, fiction is to be understood in the precise sense of belonging to the realm of discursive, meaningful existence. There is no attempt to maintain a constant and exhaustive one-to-one correspondence between a word and a sense-object; or, alternatively, between a word and its 'real' meaning. The symbolic order speaks to a fluidity (albeit self-constrained) which the imaginary order’s static one-to-one hardwiring cannot fathom.²

To bring home the distinction between the imaginary and the symbolic dimensions, and to avoid potential confusion, let us undertake a more careful examination. Implicit in this suggestion, of course, is the acknowledgment that a signifier harbours a certain dimensional ambiguity -- it hints at a kind of dimensional bifurcation. At the level of the signifier’s content, it refers only to other signifier-contents (S2). It is in this sense that we can say that, *stricto sensu*, the symbolic order deals with an opaque, metonymic meaning. At the level of the signifier’s lack, it points to a transparent fullness embodied by the *objet petit a*. The illusion proper to the dimension of the imaginary, therefore, consists in misperceiving the (noumenal or phenomenal) object as an entity whose meaning is to be found in-itself (as a kind of Platonic ideal) rather than as an effect of the symbolic order.

Let us now highlight the fine line that separates and supports the distinction between the two orders. The crossing of the threshold from a predominantly imaginary realm into a recognizably symbolic realm can be seen by engaging in a thought experiment in which a signifier such as ‘toothpaste’ (or ‘gold’) begins to function as a password rather than a strict reference to its (metaphysical) phenomenal referent. Under these circumstances, we see that the signifier circulates as a unit of exchange whose signification (ie., effectivity as a password or as exchange value) depends on its position
in the structure. In other words, symbolic meaning is a product of the element’s (word’s) contingent position in the overall symbolic network. The symbolic order, in this sense, can be identified with the prioritization of process over substance (or Justice over Good, or Gesellschaft over Gemeinschaft). This prioritization, in turn, would entertain the possibility of Goods (in the plural) rather than simply a Good (in the singular).

We could attempt a similar exercise in the case of the signifier ‘rule of law’. To highlight its imaginary character it is sufficient to recognize the effect this term has on the social (and legal) imaginary. Of course, its symbolic meaning is derived from the bundle of differences from other terms. However, the appeal to a ‘happy ending’ (ie., to the notion that agents responsible for the commission of a crime, for example, will be apprehended and will be held responsible for their actions; that accountability flows ineluctably from rules and not status) and its consequent appeasement is an unmistakable characteristic of the imaginary realm. It marks the filling function’s prevalence, and conflation with, the particular content.

We can now see why Lacan emphasized that the symbolic Other, not the imaginary order, is the locus of truth. However, Lacan’s most significant contribution to philosophy comes in the form of his real order. How exactly can we conceive of this in the context of the symbolic and imaginary orders? Let us begin by stating that the real order manifests itself in the irreducible interpenetration of one order by the other: one is always to be found in the midst of the other. On the one hand, signifiers find preliminary support in the sensorial realm of the phenomenal (both in terms of the ‘reception’ of the signifier and in terms of its mythical referent) and in the illusion of inevitability or non-arbitrariness in their designation. Meaning can only emerge with the illusion of closure, the process of capitonnage, the emergence of a master signifier. And this is why the imaginary order is not confined to the realm of the phenomenal, even though its mythical roots lie there. We could say that the presence of the imaginary is betrayed by the attempt to grasp (conceive) an object without distortion by the medium used to
apprehend it, of giving way to one’s desire by filling it with the *objet petit a*. This version of the definition of the imaginary dimension would, therefore, apply equally well to a phenomenal object such as the ‘table’ or a noumenal object such as the ‘law’. So, on the other hand, the illusion of closure, so characteristic of the (imaginary) effect of meaning, relies on the presence of the (symbolic) ‘floating signifiers’.

We find, therefore, that any attempt by one element to entirely dominate the field of signification ends in failure, for such a move is forever tied to the exclusion of its Other which, in turn, is always present in the form of its absence. And, of course, this is now deconstructive commonplace. It is important to emphasize the *irreducible* tension between those two entities; that they are radically incommensurable; that they are paradoxically linked by the irreducible gap that separates them: the real antagonism.

...And Their Relation to the Political

Let us now attempt to make the link between Lacan’s orders and our original classification of the political orders. First, we have the pursuit of a single common Good which can be rationally and transparently apprehended and implemented. Meanings are fixed and definitions can be exhaustively established. Each person is oriented by this clearly designated public Good such that each person’s actions can be evaluated on the basis of that Good. This means that there can be no distinction between private and public — such a separation is meaningless in a community of The Truth. This is most clearly seen in contemporary and past societies with no separation between Church and State. In this set-up there can be no room for a competing truth. Why? Because the imaginary order dominates. The distance between the filling function and particular filler has been short-circuited so that any attempt to introduce an alternate filler threatens the very filling function itself. The filling function is hardwired to the filler such that tugging
at the filler translates into tugging at the Good, i.e., the well-being of society. Any such competing filler immediately takes on the aura of a threat, of anti-Good (Evil), and must be suppressed or eliminated at all costs. We see here why the totalitarian temptation is integrally linked to the dimension of the imaginary. The ideal society is achievable so long as we eliminate anything that constructs itself as threat — the Jew, for instance.

With the separation of Church from State and the accompanying democratic revolutions of the eighteenth and nineteenth (and twentieth) centuries, we witness what Chantal Mouffe calls a "symbolic mutation in the ordering of social relations." (RP, 147) The establishment of liberal institutions implicitly recognized the split between filling function and filler by advocating the separation between the public and private spheres. No longer do we have a single, cherished Good. The prime value of such a liberal system attaches to a plurality of goods relegated to the private sphere and refereed by the Just rules of the public-political realm. There is an emphasis, in other words, on the value of liberty as a manifestation of the logic of difference: the ability to seek one’s own idiosyncratic good as best one sees fit, as long it does not interfere with the pursuit of another’s good. We can understand, therefore, the swing from a position whereby the State is identified with public Good to the position, subscribed to by such liberals as Hayek or Nozick, of minimal public State interference and a corresponding maximization of private goods.

What we have here, in other words, is an attempt by the symbolic order to squeeze out the imaginary order. The value of liberty and difference is being promoted at the expense of the imaginary logic of identity. Now, as we have already shown in our previous discussion, the two orders are irreducibly antagonistic, and any attempt by one to dominate the other inevitably results in a denial which is, paradoxically, a characteristically imaginary move. So, how exactly has the imaginary order returned to haunt the liberal project?
Here, we will have recourse to the ubiquitous liberal distinction between the public and the private. What we find, on the part of liberals such as Rorty or Rawls, is a replay of the totalitarian temptation betrayed by the unethical act of giving way to one's desire. Let us be more precise: no sooner had the distinction been established, thus opening up the field to a plurality of possible goods, than there was a simultaneous closure of the field by not recognizing the limits that the public/private distinction imposed. In other words, the temptation consisted in attempting, in advance, to carve out the public and private spaces; to define what counts as political and open to debate, and what counts as social and out of reach. Indeed, the traditional communitarian critique goes to great lengths to point out how the seemingly neutral state advocated by the liberals merely conceals another substantive Good; that its rendition of the public-private split is based on a radical exclusion of some goods.

Now, of course, liberals attempt to convince us that such exclusions can be justified using neutral principles of justice. (RP, 141) Politics for them is a rational process by which private interests are rationally negotiated. So Rawls, for instance, believes it is possible to find a unique solution to the problem of justice, “establishing in that way an undisputed and ‘publicly recognized point of view from which all citizens can examine before one another whether or not their political and social institutions are just.’” He concedes, however, that such a point of view will differ depending on the society one finds oneself in. In a similar vein, but going much farther, Dworkin wishes to convince us that a certain threshold number of natural rights exist which can serve as a common basis on which to judge disparate societies. (RP, 126)

Whichever of the above two liberals we wish to examine, however, the important point, from our perspective, is that the political is stripped of all passion and replaced by a cool, Habermasian, dialogic rationality. Now, in order to counter this position, we will not simply allude to the simple empirical observation which readily points to a phenomenal failure of this supposed constraining rationality to deal with political debates
over abortion, religion, sexuality, etc. -- all of which we should very calmly be able to resolve in a respectable and private manner. Rather, we will refer to the logic of the signifier which asserts the radically power-ridden nature in establishing any political order. In other words, the exclusion can only come about as a result of a power act. Why? Because the relation between the order and the Other which it excludes in establishing itself is antagonistic and, by definition, unbridgeable: no amount of rational argument will ever suffice to bridge that gap. We see, therefore, that the liberal move to truncate debate by relegating an issue to the private realm is an exercise of power hidden under the veil of ('neutral') ignorance. We find, in other words, that all social relations are based on a radical exclusion and, in this sense, are necessarily implicated in the politics of power. In other words, "[p]olitics cannot be reduced to rationality, precisely because it indicates the limits of rationality." (RP, 115)

Now, if the communitarians are right to insist that the traditional liberal framework can be deconstructed and thus shown to embody just another vision of the Good, they are also wrong to assume that this implies a return to advocating an alternative single substantive Good. This position, most strongly advocated by the likes of Michael Sandel and Alasdair MacIntyre, would most certainly constitute a regression to a more insidious form of imaginary totalitarianism. What must be salvaged from the liberal intervention is its pluralism (RP, 112), where "[p]luralism ...[denotes] the abandonment of a substantive and unique vision of the common good." (RP, 120) We must be weary of any attempt to define in advance what can and cannot qualify as political and thus open to political debate. In short, the traditional liberal position must be ridded of its essentializing tendencies manifested in the reification of the public-private split.

But what to put in its place? It is here that we can begin to understand the theoretical (and practical) significance of the radical democratic project, as outlined by Laclau and Mouffe. (HSS) The radical democratic vision insists on the retention of a
liberal pluralism and its institutionalized forums, but with a simultaneous acknowledgment of its limits. If the political and private cannot be defined in an *a priori* fashion, this means that every sedimented social relation is also a repressed political relation that can be potentially reactivated. Furthermore, we find that, with the incidence of the rights discourse, a multiplicity of communities develop about a variety of once-private issues. In other words, we have a proliferation of collective identities representing different communal goods -- something which is clearly reflected in the current political climate of 'new social movements.' In a way, we have a kind of plural communitarianism.

The important point, however, is the recognition of the irreducibility of antagonism and conflict. In other words, political debate can no longer be thought of in terms of rationality or reasonableness. Rather, we must fully assume a specific kind of political reasoning from which power cannot be evacuated: hegemony. We can see, now, why Chantal Mouffe's latest book bears the title *The Return of the Political*. We must understand this in its strict Lacanian sense: the return of the *repressed*.

Politics is to a great extent about the rules of the *respublica* and its many possible interpretations, it is about the constitution of the political community, not something that takes place inside the political community as some communitarians would have it. Political life concerns collective, public action; it aims at the construction of a [hegemonic] 'we' in a context of diversity and conflict. But to construct a 'we' it must be distinguished from the 'them' and that means establishing a frontier, defining an 'enemy'. Therefore, while politics aims at constructing a [hegemonic -- LJG] political community and creating a unity, a fully inclusive [hegemonic -- LJG] political community and a final unity can never be realized since there will permanently be a 'constitutive outside', an exterior to the community. Antagonistic forces will never disappear and politics is characterized by conflict and division. Forms of agreement can be reached but they are always partial and provisional since consensus is by necessity based on acts of exclusion. (RP, 69)

Let us recap. We have shown in what sense we can construe the triad communitarianism-liberalism-radical democracy as instances of domination of the social
field by each member of the Lacanian orders in turn: imaginary, symbolic, and the real. How else may we conceive of this transition in order to deepen our understanding of the radical democratic project? We could say that traditional communitarians are completely oblivious to the split of the signifier and in this sense readily succumb to the temptation of giving way to their desire. The traditional liberals, for their part, implicitly acknowledge the split, but also give way to their desire by reifying that split in the form of the public/private dichotomy. A radical democrat deconstructs the fixity of the dichotomy by showing that the identity of each of its elements is incomplete and constantly being subverted. The split, in other words, acquires a partial fixity by deferring/maintaining one's desire.

A Lacanian approach tells us that the public/private split that the liberals cling to cannot come off with a certain remainder: the form is always stained by a pathological content. Though we have explained this feature in terms of the logic of the signifier, we can also relate it to our previous discussions of desire and fantasy. We will recall that desire is always the desire of the Other, where the Other designates the entirety of the discursive field. And it aims at the objet a embodied in a particular signifier. Now, what is the liberal distinction between public and private if not an attempt to artificially divide a discursive field? Since the sole qualification placed upon a desire's object-cause is that it be discursive, we immediately see the absurdity of the liberal attempt to foreclose desire from one field of signifiers and relegate it to another. We are inextricably enmeshed in a dialectic of envy which overdetermines, and thus does not respect, formal attempts to separate 'proper' objects of desire from 'improper' ones. And what is this but another way of pointing to the irreducible particularity of each person's fantasy? The dialectic of desire means that the eventual intrusion of one person's fantasy into another's is inevitable. This marks the irruption of the real, the transformation of a serene sedimented social relation into an antagonistic political relation which then seeks to be resolved. And it is the ability of the existing political system to deal with such
unpredictable eruptions that will determine its radical democratic potential. Thus, the “specificity of pluralist democracy does not reside in the absence of domination and violence but in the establishment of a set of institutions through which they can be limited and contested.” (RP, 146)

Let us now examine more carefully the idea of a political ethics of the real; and let us do this by following Joan Copjec in her analysis of utilitarianism.

**Utilitarianism**

What must be clear from the above discussion is that a radical democratic critique of the communitarian and liberal positions must take issue not only with the political issue of what substantive goods we should aspire to, but also with the *ontological-*epistemological issue of how those goods are conceived and what role they play as centres of common political identities. In other words, we must import with full force the postmodern sensibility which highlights the totalitarian temptations associated with an essentialist mode of thinking. We found such temptations lurking not only explicitly in the communitarian ideal, but also implicitly in the liberal ideal. In this sense, we could say that the liberal attempt to ascribe essential identities to the public and private constituted a communitarian Good in disguise. Their imaginary misrecognition emerged as a result of mistaking the hegemonic status of a particular interpretation of the liberal democratic principle as the only possible Just interpretation.

Utilitarianism, as a political philosophy, has been adopted by communitarians and liberals alike -- explicitly by the former, implicitly by the latter. In the former instance, it functions as a principle by which the means justify the (Good) ends. In the latter instance, it attempts to pass as a neutral principle whose applications result in Just outcomes. Legal Process and ‘law and economics’ scholars are often accused of such
blindingly liberal implementations. We see, therefore, that utilitarianism, in either of its guises does not acknowledge the strictly political nature of its operation. It ignores the radical exclusion upon which its very existence depends. This means that certain issues and voices are excluded from public debate and are left to simmer beneath the seemingly calm social landscape. And the development and maintenance of this blind spot is made possible by a modernist epistemological outlook which essentializes every difference into a separate, independent, and unconnected positivity.

From a radical democratic perspective, and from Lacanian perspective, the ethics implied in utilitarianism must be abandoned. It is here that we shall examine Joan Copjec’s contribution to the clarification of an (epistemological) ethics of the real.

Without entering into a detailed examination of the archaeology of the utilitarian ideal, which could perhaps be traced to pre-Socratic times and which was revitalized and formalized by Jeremy Bentham and John Stuart Mill, we suggest a simple and popular formulation which, nevertheless, touches its most characteristic elements: the greatest happiness for the greatest number.

But first, how is the link made between utility and happiness/pleasure? As Joan Copjec points out, use is pleasurable in the sense that “man seeks those things that are most useful in maximizing his own pleasure and minimizing his own pain.” Now, the problem with the utilitarian approach, as will be seen in more detail shortly, is its quick degeneration into a ‘despotism of utility’ and an “unethical ‘penchant for expansion.’” Very soon, the relationship becomes inverted: pleasure becomes useable. This is because pleasure is identified as being at the service of the common good. Thus, pleasure must be maximized for the benefit of the social whole. And this means that some pleasures (for some people) must be prohibited.

Lacan’s critique of utilitarianism takes issue not only with utilitarianism itself, but also with the traditional liberal critique of utilitarianism. It is not sufficient, for example,
to point out, as the liberals do, that it would be presumptuous for us to assume what the ultimate pleasurable goal is for a (eg., colonial) subject. This liberal criticism highlights the totalitarian temptation inherent in any drive to fulfill a common good. In other words, the door swings open for the sacrifice of the innocent. It is sufficient to recall the notorious staged trials during the heydays of Stalin or during the Chinese Cultural Revolution.

Seduced into believing that there is a positively identifiable cause for every effect, utilitarian and liberal advocates cannot fathom a substanceless cause (as in repressed desire) which only presents itself retroactively (such that the effects precede their cause). Another name for this phenomenon, of course, is encapsulated in Freud’s famous discovery: the unconscious. As Lacan points out, both the utilitarian and the liberal assume that the pleasure principle serves as the dominant organizing nexus. What they do not and cannot account for, however, is the presence of a domain beyond the pleasure principle, namely the Freudian repetition compulsion, or the Lacanian real. They cannot, for example, explain why individuals are often not driven to seek their own good or why individuals engage in masochistic activities.

And this leads us to the articulation of a new ethical principle: the death drive, which calls, as we have noted elsewhere, for separation rather than alienation or surrender to our desire. The idea is to maintain one’s repressed desire through separation (ie., by keeping the subject-vessel (into which the objet petit a is lured) empty in the same sense in which we attempt to maintain the space of the democratic subject free), rather than surrender to its pathological fillers and incentives. This ethics of the real (because it is the real which separates the filling function from the filler) also ascribes a very different role to moral laws.

Let us recall, for a moment, our discussion about power relations and, specifically, the irreducibility of power at the intersection of a multiplicity of possible historical trajectories. What decides which of those paths one ends up following hinges
upon a *contingent* decision-making act. Now, what we must remember is that such an act is, strictly speaking, a hegemonic act, a power act. The (partial) fixing of a trajectory or meaning is nothing but the operation of the logic of the signifier in the form of the *point de capiton*. In other words, the metaphoric operation whereby a signifier is established as master is conditional upon the *repression* of alternative meanings or trajectories, of alternative *desires*. The satisfaction of our present desire can only come about as a result of the repression of Other desires. It is in this sense that we can say that repressed desire *causes* the institution of the Law, rather than the other way around.

Let us look more precisely at the nature of this Law. We see that its very existence is tied to the radical exclusion of a series of alternatives. And what is this if not the real *jouissance* from which we must recoil in order to establish our symbolic universe? We can thus speak of the Law as a *pacifying agency*. It serves to delimit the unbearable suffocation of too close a proximity with our *jouissance*, of our confrontation with a series of possible options about which we cannot ever rationally decide (as liberals would have us believe). The pacifying Law denotes the non-foundational, hegemonic, political act which relieves us from this stifling and incapacitating (real) knowledge. We can now see why Zizek suggests that Dostoyevsky’s view, expressed in *The Brothers Karamazov*, that ‘if there is no God (ie., Law), *all* would be permitted’ must be revised to read ‘if there is no God *nothing* would be permitted.’

However, this is not the end of the story, for that which is excluded does not merely ‘vanish’ with the imposition of a particular order; rather, as we have noted, it is *repressed*. And this repressed *Thing (jouissance)* is nothing but the superegoic Other which serves as an explanatory matrix for such things as guilt and masochism, which neither the communitarian, nor the liberal version of a utilitarian ethics can account for. In other words, the alternative trajectories which had presented themselves at the time of the decision and which were necessarily excluded do not simply disappear without a trace. On the contrary, they continue to *in-sist* by exerting a kind of pressure upon the
‘chosen’ path. But this place from which this pressure originates is not of the order of ordinary discursive existence. Rather, it ex-sists in the precise sense of discursive limits – as that which hints at something radically external, but which can only do so from within the very intimacy of discourse itself. Here, again, we have a clear presentation of Lacan’s paradoxical notion of extimacy.

Where in all this, then, shall we locate the ethics of the real conceived as the death drive? Where else but in the suffocating and paralyzing (real) knowledge of the ultimate contingency of our being as embodied in the Thing? And here the image of the moth-moi and the flame-Thing readily comes to mind. Of course, we are not advocating the ultimate demise of the moth (or our own suicide) as the ultimate ethical gesture. Not at all. The death drive speaks to a constant and repetitive circling of the Flame-Thing, a keeping alive of the signifier’s split which will point to the contingency of any established order and thus its susceptibility to re-evaluation and challenge. And how exactly does this order begin to loosen its grip? Through the return of the (previously excluded) real Other, whose particular identity cannot ever be determined in advance because it is contingent upon the symbolic resources (floating signifiers) available at the time of its return.

Now, just in case we fool ourselves into thinking that such theoretical musings have no practical relevance, let us briefly comment on the work of a legal scholar whose frequent concrete examples may be said to bring her own theoretical framework ‘down to earth’. It is our position that Martha Minow’s exposition becomes theoretically untenable when she lapses into what Lacan refers to as the male logic of the ‘all’ -- with all the totalitarian connotations this implies -- in which she attempts to identify every conceivable exclusion entailed in the law-making process in advance. As Katherine Bartlett argues in her perspicacious review of her text,11 Minow seems to suggest that her relational analysis can be used to eliminate all forms of domination and antagonism by
including all such voices in advance. The ethics of the real tells us that no matter how Herculean an effort we make to establish such an exhaustive list there will be, by definition, voices excluded. Furthermore, the process by which a decision is made that a relation is one of domination or oppression is a hegemonic decision that cannot ever be rationally justified on the basis of an essential foundation. The only thing one can do is be attentive to immediate and present concerns and deal with each unforeseen exclusion as it arises via the return of the real. The point is that a constant circling of our jouissance heightens our sensitivity to such returns and widens the horizon of possibilities open to hegemonic articulation.

Let us now 'return' to the Thing. As we have already noted, an ethics that subscribes to the death drive does not translate into suffocation at the inability to choose among options. Rather it helps us recognize that the hegemonic choice entails the repression of desire: the satisfaction of our desire by its object (petit a) means that other objects of desire have been suppressed. However, this necessary suppression need not lead to a surrender of our desire. A surrender to our desire means that we have succumbed to the imaginary illusion that a particular desire (objet a, ideal ego) could ever fully satisfy the desire to desire (S1, the pacifying law, ego ideal) whose radical Other is the desire not to desire ($, the superego). We have again, here, the logic of the signifier: the filler and the filling function are incommensurable and so can never achieve a harmonious relation. Thus, we see how it may be possible to keep alive our desire, even though we make a decision. We must maintain the separation of the symbolic content of the decision from the imaginary ideal which it seeks to fulfill. And this separation is the Lacanian bar: the real. And can we not see, here, the inextricable interdependence of the three Lacanian orders which Lacan would often represent in the form of a Borromean knot?
To return to Dostoyevsky by way of Kafka, for a moment, let us consider what the consequences of the absence of Law might entail. We mentioned its pacifying qualities. How else can we explain this emergence of Law? Let's begin by suggesting that the superegoic Other gushes forth to fill the void. Its stifling and paranoid oppression gives us no way out; we don't know what this Thing wants; we crave certainty and yet it doesn't give us any clues; it transfixes our attention, yet it suggests nothing. And is this not the recipe for a Kafkaesque novel? It is sufficient to recall the doorkeeper in his *Before the Law* who persecutes the man from the country by not letting him gain admission to the Law, a persecution which stems from silence and lack of direction -- an oppressive weight of infinite possibilities: we feel like we must do this and that and the other and so on. And this occurs prior to the Law. We see, therefore, why a Kafkaesque corrective is required to Dostoyevsky's famous statement on why God's (Law's) existence is necessary: The arrival of the pacifying Law comes as a result of a recoil from our disgusting and stifling Other: our *jouissance*.12 *Jouissance* causes our moral laws, not the other way around, but, at the same time, this cause is a retroactive one; the effects necessarily precede the cause.

With these preliminary notes, we should now be able to appreciate more fully Copjec's elaboration of the role of the Law and its relationship to desire and a psychoanalytic ethics of the real:

Moral order is established, according to psychoanalysis, not in obedience to some reasonable or compassionate command to sacrifice our pleasure to the state, but because we recoil before the violence and obscenity of the superego's incitement to *jouissance*, to a boundless and aggressive enjoyment.... In resisting the superego, then, we insist on separating ourselves from, rather than surrendering to, this incomprehensible part of our being; we insist, in other words, on prolonging the conflict with ourselves. The sole moral maxim of psychoanalysis is this: do not surrender your internal conflict, your division.

This is an extraordinary account of moral law, which we can understand only by continuing to clarify its opposition to utilitarianism....

... Unlike utilitarianism, which tacks onto the interdiction of pleasure a list of rewards – extended kinship relations, women, property, trade routes...-- psychoanalysis detaches its interdiction from any promise
of pleasure, it razes the ethical field, sweeps away all good objects. The
psychoanalytic interdiction does not make reward the condition of
sacrifice; one must obey the interdiction unconditionally. Pleasure is,
then, of no use in securing commitment to moral law.

What is crucial for psychoanalysis is not the reciprocity of
individual subjects in their relations to a contingent realm of things, but
the nonreciprocal relation between the subject and its sublime,
inaccessible Thing; i.e., that part of the subject that exceeds the subject, its
repressed desire. Nor is the figure of the woman central to moral law the
daughter who will be exchanged, who will be made accessible to the larger
community, but rather the mother who is and must remain, according to
the interdiction, inaccessible to the subject. The moral interdiction bears,
in other words, on an impossible object (not, as in utilitarianism, on an
actual object that one might otherwise possess), the mother, who is
impossible because she is already unattainable. It is because the good
object is already lost, desire has already been repressed, that the law
forbids access to it. This means that repressed desire is the cause, not the
consequence of moral law. The subject does not surrender its desire in
order to gain the rewards society offers as incentives, instead the subject
maintains its desire rather than succumb to these ‘pathological’ motives
for giving it up. Far from offering any benefit, the sadistic law of
psychoanalysis offers the subject only further suffering, a prolongation of
its separation from the object of its desire.

Why does psychoanalysis take such pains to expose the cruel
enunciator, the sadistic superego, who speaks the moral law? Because it
wishes to demonstrate the ethical necessity of hearing the otherness of this
voice and of maintaining our distance from it. It is always and only this
division of the subject on which psychoanalysis insists, not simply because
the attempt to establish an ethics on the basis of its disavowal is mistaken,
but -- more importantly -- because it is unethical. The principle of the
maximization of happiness on which the ethics of utilitarianism is based is
a product of this disavowal; it is also responsible for some of the most
violent aggressions against our neighbours.

... The utopian dream of a society in which relations of exchange
would be harmonious and universal was dreamt up in the nineteenth
century as an evasion of the recognition of the failed -- a forbidden --
relation of the individual subject to its terrifying, superegoic Other -- its
Neighbour. Rather than recoiling from the obscene/sublime part of itself,
utilitarianism refused to recognize it, setting itself up on the erasure of its
self-contesting aversion.13

Of course, integrally linked to the psychoanalytic ethic is the conception of the
subject as lack. For what are society’s incentives but the fillers that are thrust at us in the
hope that we should unthinkingly assume them as subject positions? We clearly see the
severely limiting liberal conception of the fully rational and unitary agent fully
constituted and conscious of his or her desires. The liberal conception misses the crucial element of the process of identification: the constitutive nature of the decision-making process itself. The individual modifies him or her self with each decision as different circumstances arise. There is no such thing as a fixed essence which determines one's will. On the contrary, Lacan's view of the subject as split, as decentred, as a lack, means that it does not know what it wants. The desire can only be the desire of the symbolic Other; our desire can only be embodied in currently available discursive elements. But which, precisely, of those elements comes to fulfill that function is a purely contingent (and hegemonic) matter, involving a simultaneous repression of a series of other possible desires (the real Other). An ethics of the real is a severe and tragic ethics but one that must be fully assumed. In identifying with a symbolic trait (environmentalist, for example), we must not simply take a principled stand with respect to the environment and struggle for a hegemony of this view; we must continually encircle our jouissance by separating this particular content (a) from its space of inscription (S1), thereby fully assuming the radical historicity of our being. And as Laclau notes, this attitude calls for a new kind of hero:

[S]omeone who is confronted with Auschwitz and has the moral strength to admit the contingency of her own beliefs instead of seeking refuge in religious or rationalistic myths is, I think, a profoundly heroic and tragic figure. This will be a hero of a new type who has still not been entirely created by our culture, but one whose creation is absolutely necessary if our time is going to live up to its most radical and exhilarating possibilities. (CIP, 98)

And such an anti-essentialist ethics also suggests why the liberal attempt to clearly differentiate the public and neutral process from the private and pathological substance (in Rorty's terms the public space of the bazaar from the private clubs14) is theoretically untenable. And as we saw, if we give way to our desire (by not acknowledging its open-ended dialectical nature) we also give way to the totalitarian temptation. It is in this sense that "utilitarianism overlooks the contingency of circumstances in which people live, as
well as their incompatible desires and interests." Rawls, for instance, remains firmly within the liberal tradition whose main assumption is the rational autonomous nature of subjecthood. In other words, though he recognizes that the 'original position', or the 'veil of ignorance' cannot be conceived but from within our current hermeneutic horizon and so function only as fictions ('retroactive myths') by reference to which we make decisions and orient our lives, he leaves out the important dimension of fantasy (and corresponding notions of desire and envy) -- a dimension which speaks to that part of us which sustains us: the real-impossible jouissance.

In other words, Lacan reminds us that we can never escape the dielectic of desire/envy: desire is always the desire of the Other. There is "no general, neutral desire for primary goods excepted from the intersubjective dialectic of envy, ie., the relationship to the other's desire. It is precisely because of this intersubjective overdetermination of the subject’s relationship to goods that the subject’s pursuit of its desire does not coincide with the realization of one’s ‘rationally’ perceived good."

But this is not to say that we can do without the public/private dichotomy or without other important dichotomies. Rather, these observations are meant to point to the irreducible split upon which such oppositions live. A Lacanian ethical stance, manifested most succinctly in respect of the radical democratic project (and which will be taken up next), suggests that "[t]he democratic attitude is always based upon a certain fetishistic split: I know very well (that the democratic form is just a form spoiled by stains of ‘pathological’ imbalance), but just the same (I act as if democracy were possible)." (LA, 168)
Specifying the Radical Democratic Anti-Utopian Utopia

Crucial to understanding the nature of radical democracy is the distinction that Mouffe makes, in following Blumenberg, between two moments of modernity: the political project of self-assertion and the pursuit of equality and liberty for all on the one hand; and the epistemological project of self-foundation, on the other. (RP, 41-42) Whereas a postmodern, anti-essentialist sensibility forces us to reject and replace the latter, it deepens and bolsters a commitment to the former. And a commitment to the radical democratic project must be understood to engage with both these moments. First, it radicalizes the liberal-democratic principle of ‘liberty and equality for all’ to reveal the irreducible tension between its democratic logic of identity and its liberal logic of difference. It is in this sense that we can speak of a radical democratic ethics which is on a par with the psychoanalytic ethic. And second, it subscribes to a political substantive good which corresponds to a specific interpretation of that principle: “a radical democratic interpretation will emphasize the numerous social relations where relations of domination exist and must be challenged if the principles of liberty and equality are to apply.” (RP, 70)

In order to better understand the project of radical democracy, we could begin by placing it at the end of an evolutionary scale that begins with the traditional communitarians which conflates the public and the private, and the political with the moral; and which subscribes to an imaginary ideal of the Good that admits of no pluralism. Here, we would probably find the likes of MacIntyre and Sandel. Our second major stop along the scale is at the traditional liberalism of Nozick and Hayek. Whereas our first group exemplifies a domination of the socio-political field by the logic of identity and the promotion of one Good and one community, our second group exemplifies a domination by the logic of difference and the promotion of goods without limits (in the market place of ideas, for instance). Now, in between these two extremes
we find clusters of scholars who subscribe to various notions of the ideal society whose particular form depends upon the relevant admixtures of the heterogeneous logics. Thus, we may find Taylor, Walzer, and Habermas closer to the traditional communitarian end of the scale; and we may find Rawls, Rorty, Dworkin, and Ackerman toward the traditional libertarian end of the scale, with Raz approaching the centre on the liberal side.

Now, this ‘classification’ is not at all meant to attempt to neatly compartmentalize the theoretical terrain with exactitude or finality. We wish merely to indicate how, roughly, radical democracy will fit into the picture as a ‘fresh’ alternative. From a radical democratic perspective, what these conventional approaches have in common is an appeal to a metaphysics which is not acknowledged. Whether in the form of an ideal Society, fully constituted and constitutive of individual choices; or in the form of an ideal Individual, fully constituted and constitutive of Society; both succumb, in varying degrees, to a modernist epistemology of essentialism. This is because they are caught in an imaginary-symbolic web whose incentives promising a Utopia appear too seductive to resist. We find that the scholars who hover between the two extremities are guided less by critical analysis than by intuition. An either/or approach which declares that the logics of identity and difference are incompatible and that, therefore, we must choose one over the other leads to one of the two extreme positions. It is what permits Carl Schmitt, for instance, to declare that dictatorships like fascism and bolshevism, while they can be considered anti-liberal, cannot be considered anti-democratic. (RP, 121) More moderate scholars flounder in the middle with incoherent justifications and simmering negative supplements because they are unable to grasp the nettle that unsettles us and animates our intuition.

And what exactly is this nettle? The real objet petit a, of course. It is here that radical democracy enters the fray and places itself on the map. Its conceit is to elevate intuition to the level of theory. Lacanian psychoanalytic theory and radical democratic theory involves nothing but the more precise theorization of this ‘common sense’, a
common sense which has changed a very considerable amount as a result of a recent increased rate of social change. Instead of trying to endlessly reconcile the incommensurable logics of identity (democratic communitarianism) and difference (liberalism), radical democrats fully assume this radical incompatibility. At once we realize that it is the very attempt to undertake such reconciliations that leads one down the garden path of imaginary essentialism. This is not to say that we can ever fully escape the imaginary order. As we have seen elsewhere, that would constitute an impossible, even deadly, task. Rather, it means that the adoption of any ideal must acknowledge, at the same time, the impossibility of ever grounding it in a fully rational and exhaustive foundation. What this postmodern approach does, however, is to open us up to whole new vistas of possibility without being pathologically tied to a rationalist foundation. It also alerts us to the irreducible nature of power and the exclusion this entails in each and every political decision that is made.

This is why the communitarian ideal of a fully sutured Society must be abandoned. This is why the liberal ideal of a fully constituted and autonomous agent must be abandoned. This is why it is not sufficient, as the liberals suggest, to subscribe to pluralism without acknowledging its limits. The idea of a neutral state which can settle disputes through purely rational means ignores the fact that such reasoning requires a (foundationalist) point of reference which itself cannot be justified. It makes invisible the irreducibly exclusionary power dynamics that constitutes every social relation and so cannot be contested. In other words, some interpretations of the liberal democratic principles of 'justice' are necessarily repressed and these limits to pluralism must be acknowledged: “Antagonistic principles of legitimacy cannot coexist within the same political association; there cannot be pluralism at that level without the political reality of the state automatically disappearing.” (RP, 131) Furthermore, we must recognize that, upon the basis of the unbridgeable split of the signifier, such limits are not simply empirical but logical. Thus, Mouffe can argue that "those who conceive the pluralism of
modern democracy as a total pluralism, with the only restriction being an agreement on procedures, forget that such ‘regulative’ rules only have meaning in relation to ‘constitutive’ rules which are necessarily of another order.” (RP, 131)

The logical necessity of a constitutive outside also shows why critiques of postmodernism totally miss the mark when they accuse anti-essentialists of opening the floodgates to absolute relativism. Such accusations can only be meaningful from the perspective of the essentialist who misperceives difference as an essential positivity. Such lapses into essentialism which are, even today, not infrequent come as a result of a careless and unsophisticated handling of the logics of equivalence and difference. That is why the theorization of common sense is, though \textit{prima facie} trivial, crucial if liberal democracy is to survive. There are no guarantees that the collapse of traditional communitarianism will result in liberal-democracy taking its place. Twentieth century Eastern Europe will not let us forget this.

The logics of liberty and democracy are antagonistic. They are irretrievably \textit{separated} from one another, yet they are also \textit{linked} in permanent tension with each other. A thorough understanding of this kind of relationship is necessary for liberal democracy to be properly legitimized and so diminish the risk by which it will be effaced by either a dominating liberal logic or a dominating democratic logic. And, as far as the exact type of democracy is concerned (representative, direct, or other), this cannot be determined in advance for all cases. This will necessarily be dependent on the particular antagonistic relation, and will hinge on how the resolution of the issue can be best articulated \textit{with} a particular type of democracy \textit{through} the principle of liberty and equality.

Thus, we begin to glimpse the truly paradoxical nature of a radical democratic regime premised upon a radicalization of the principles of liberal democracy. There is never a \textit{finally} binding conception of radical democracy. Rather, it is an impossible democracy which is always ‘to come’, (RP, 8) because if it \textit{did} come it would,
paradoxically, cease to exist. There is no objective communitarian Good or liberal Justice that we can appeal to through objective laws of history or neutral principles of fairness. There is no such thing as an ultimate pool of shared values in the same way that, as Lacan says, 'there is no sexual relationship.' Democracy functions against itself. It functions to repeatedly postpone its final arrival; to interrupt a final suture of Society. Power, conflict, and antagonism are irreducible, indeed necessary, for radical democracy to work. Therefore, only goods, in the plural, can exist, and these can only be temporary. It is in this sense that we need to be able to “think the ethics of the political.” (RP, 113) A radical democratic politics takes its own failure into account in advance. In a way, we could say that the radical democratic ethics is an ethics of the boomerang. We train ourselves, in advance, on how to cope with a close (but, ultimately, always failed) encounter of the Ideal kind.

Now, we have seen how a radical democratic project seeks to salvage pluralism (and its corresponding institutionalized fora) from liberal theory and some notion of a community good from communitarianism by creating a kind of plural communitarianism. We must be careful, however, not to succumb to the temptation of replacing an essentialism of the communitarian whole (Social, Good) with an essentialism of liberal parts (Individuals, Goods). The radical incommensurability of filling function and filler means that there can never be a final and fully constituted identity at either level of analysis. In other words, the constitutive subject positions that make us up do not form a coherent additive alliance which presents itself as an individual. There is no simple plurality of separate and coexisting subject positions. Rather, each subject position constantly overdetermines and subverts others through hegemonic articulations which are contingent, metonymical, and partially external to otherwise autonomous spaces. (HSS, 134-145) Our identities are thus always multiple and only partially and precariously
fixed, always being transformed by the ebb and flow of the logics of equivalence and difference.

And, of course, this is why it is theoretically unsound to maintain a rigid distinction between the public and the private, the political and the social, the citizen and the individual, man and woman. Once every social relation is examined in a specifiable context, we find that such distinctions are constantly shifting and being renegotiated, an evolution which cannot be pinned down. When, for instance, an antagonism erupts in the midst of the social and elevates it to the political, this incidence (of the discourse of rights, for example) is always partially external and, therefore, hegemonic.

Thus, a radical democratic approach replaces the rational form of political reasoning with a hegemonic form of political reasoning -- an arrangement that better guarantees its permanent susceptibility to challenge. “The specificity of modern democratic pluralism is lost when it is envisaged merely as the empirical fact of a multiplicity of moral conceptions of the good. It needs to be understood as the expression of a symbolic mutation in the ordering of social relations: the democratic revolution envisaged in Claude Lefort’s terms as ‘the dissolution of the markers of certainty’.” (RP, 147) And such a ‘loss of innocence’ should be fully embraced rather than lamented. Far from making political life susceptible to chaos, it grounds it in firmer terrain. It means that hegemonic positions will have to be constantly defended, rather than assume a universal, foundational ‘right’ to its dominance.

One final caveat. We have seen how radical democracy can be conceived of as a two-pronged project: an epistemological project of anti-essentialism and a political project of “trying to extend the principles of equality and liberty to an increasing number of social relations.” Could the radical democrat be accused of neo-liberalism by ‘essentializing’ such a dichotomy in the same fashion that she accuses the liberals of
‘essentializing’, say, the public/private dichotomy? In other words, could we not say that what is relegated to epistemology does have a right and wrong answer, but what is regarded as political is debatable? The answer cannot be ambiguous. If we assume a degree of consistency, and start from the anti-essentialist premise of a radical interpenetration of each of the poles of such oppositions, we must conclude that the very attempt to establish a name, category, dichotomy, is, by definition, a political-hegemonic move. (This means that it is contestable, involving a careful examination of a specific case in which an excluded voice claims the status of the ‘return of the real’.) We see, therefore, how an epistemological anti-essentialism, like its political sister of radical democracy, takes its own failure into account in advance. But this will become clearer in the following paragraphs.

So far we have highlighted the ethical nature of the radical democratic sensibility (ie., its onto-epistemology). Let us now, very briefly, engage with its political project, ie., the substantive interpretation of the liberal-democratic principle. We now know that it is the political arena as a system of rights guaranteed to all members of political communities, and especially the principle that informs these rights (namely, the principle of equality and liberty), that sets the scene for the multiplicity of interpretive hegemonic struggles about the text of the principle. Thus, taking Chantal Mouffe as our representative in a struggle for a radical democratic hegemony, we find a call for an active citizen who is no longer “someone who is the passive recipient of specific rights and who enjoys the protection of the law” (RP, 69) as in the liberal conception, but rather is identified with a particular interpretation of the respublica.22 This implies “seeing citizenship not as a legal status but as a form of identification, a type of political identity: something to be constructed, not empirically given.” (RP, 65-66)

Now, Mouffe advocates a radical democratic interpretation (and thus a radical democratic political identity or citizenship) which emphasizes “the numerous social
relations where relations of domination exist and must be challenged if the principles of liberty and equality are to apply.” (RP, 70) For instance, “as a process of democratization of the economy, socialism is a necessary component of the project of a radical and plural democracy.” (RP, 90) And we must remember that struggles identifying with such an interpretation construct a ‘we’ of radical democratic citizenship which is not a simple alliance. This is because, although such an articulatory practice serves to invoke the social logic of equivalence, thus linking up previously autonomous political spaces in which democratic struggles are taking place (anti-racism, anti-sexism, anti-capitalism, etc.), it is important to remember that there is an opposing and supplementary logic of autonomy which operates to retain the differential specificity of the political spaces being equivalentially linked. In this sense, “equivalence is always hegemonic insofar as it does not simply establish an ‘alliance’ between given interests, but modifies the very identity of the forces engaging in that alliance. For the defence of the interests of the workers not to be made at the expense of the rights of women, immigrants or consumers, it is necessary to establish an equivalence between these different struggles.”

We can see, therefore, how the radical democratic political project is inextricably linked to its epistemological project. This precarious nature of identificatory unfixity means that the liberal ideal of an autonomous individual must be abandoned. “[I]n the field of politics, it is groups and collective identities that we encounter, not isolated individuals, and its dynamics cannot be apprehended by reducing it to individual [utilitarian -- LIG] calculations” (RP, 140). And unlike the communitarians who advocate a substantive Good with which to identify, radical democrats advocate an indeterminate universal whose particular content can be seen to be temporary and contestable. (RP, 147) In other words, in place of a communitarian melting-pot politics of the Whole, and the liberal’s rainbow politics of the Parts, both of which subscribe to an epistemological essentialism, the radical democrat advocates a kind of kaleidoscopic politics in which each moment of articulation transforms the identity of its mythically
‘original’ elements; and in which the identity of each of the ‘current’ elements is given by its ‘reflected’ difference from all the other elements. In other words, each element’s transformation simultaneously causes, and is caused by, the hegemonic articulation that connects one to another. The principle of articulation (the twisting of the kaleidoscope) is always external to the elements themselves but is, at the same time, dependent on (for its detection), and thus internal to, them. Unlike the melting-pot and rainbow analogies which attempt to fix in advance the contents of the political and social, the kaleidoscope metaphor highlights not only its transient nature but, perhaps more importantly, its repressive nature. Why? Because the composite image that it offers us is strictly based upon a suppression of alternative micro-arrangements.25

Now, this also means that we cannot appeal to an ultimate rational foundation with which to justify political decisions. Such decisions are strictly hegemonic and power-laden. The empty universal attempts to remind us that “any social objectivity is ultimately political and has to show traces of the exclusion which governs its constitution, what we can call its ‘constitutive outside’. As a consequence, all systems of social relations imply to a certain extent relations of power, since the constitution of a social identity is an act of power.” (RP, 141) Thus, the radical democratic interpretation constitutes an act of power which seeks to exclude on the basis of liberty and equality and the equivalential articulations this engenders among disparate floating signifiers in the socio-political field. Unlike liberalism, it does not seek to eradicate antagonism, for this would be first, impossible and, second, a dangerous illusion to orient oneself by. It is in this sense that Mouffe can say that the absence of a political frontier should not be misperceived as political maturity, but as the doldrums before a storm. (RP, 5-6) The idea is to mold the antagonistic modes of expression as they arise one by one by transforming the antagonistic ‘enemy’ to an agonistic ‘adversary’. (And it goes without saying that the dichotomy antagonism/agonism is itself hegemonic and context
Radical democracy must, in other words, include an anti-essentialist epistemology as an internal moment of its project.
Role for the Progressive Legal Scholar

In our discussion of the rights discourse we witnessed the irreducible political character of the decision-making process, specifically within the context of legal discourse. This forced us first, to reconceive the rights discourse away from the view that it reproduces the form of a capitalistic mode of production and toward an open-ended conception that reproduces the form of the dialectic of desire; and second, to examine in more detail the nature of politics and political theory. From our itinerary, it will be obvious that progressive legal scholarship is merely one form of political engagement, and so our concentration on the radical democratic project should be seen as directly relevant to the progressive contemplations of legal scholars. But let us first briefly remind ourselves of the debate on the progressive potential of rights in law.

On the one hand, we have those who suggest that neither indeterminacy, nor reification are, in themselves, fatal to the progressive movement. On the contrary, both are crucial components of an effective progressive subversion. Accepting the tenuous relationship between signifier (rights) and signified (meaning) opens up new vistas of possibilities for counter-hegemonic reifications. As Schneider explains:

Rights discourse can express human and communal values; it can be a way for individuals to develop a sense of self and for a group to develop a collective identity. Rights discourse can also have a dimension that emphasizes the interdependence of autonomy and community. It can play an important role in giving individuals a sense of self-definition, in connecting the individual to a larger group and community, and in defining the goals of a political struggle, particularly during the early development of a social movement.26

Nevertheless, and on the other hand, the theoretical open-endedness of interpretive possibilities, also provides opportunities to further entrench the status quo. Indeed Judy Fudge and Harry Glasbeek go so far as to say that the rights discourse, as a transformative instrument, has a track record overwhelmed by failures.27 Thus, free
speech rights, mainly because of their abstract and indeterminate nature, have been turned to satisfy the ends of the mass communications media, the Nazis, and the corporate sector in general. Freedom of religion rights have been co-opted by business interests, and the freedom of association has resisted a collectivist interpretation in favour of an individualistic conception, more in line with a judicial history rooted in the common law. Further, they go on to say that any advances made in the realm of legal rights are almost totally eclipsed by the staggering figures indicating unprecedented incarceration levels, not to mention the severely disproportionate numbers of individuals belonging to marginalized groups. Lastly, though it is acknowledged that the rash of male-instigated litigations under the equality provisions shows signs of abatement, the fact remains that, in Canada at least, “the disadvantaged still have to look to non-constitutionalized human rights legislation: the Charter only binds governments, not private property owners. And it is in the private sphere where the impact of discrimination is felt most severely.”

The time and expense involved in launching such actions only serve as further debilitating factors.

Though such apocalyptic rights criticisms have important lessons to impart, it is also necessary not to lose sight of the significance of the rights discourse. As we have repeatedly pointed out, its power lies not in some guarantee that outcomes will be progressive. (After all, what is progressive is largely dependent on who is doing the observing.) Rather, its value lies in the space it creates for alternative possibilities. This is not to say that structural constraints (which may defeat ‘progressive’ challenges) simply vanish. Instead, it means that such constraints are loosened. Whence, we must take heart at the advances that are being made -- advances which would have been unthinkable even decades before. Such advances are not hard to discern in the recent contextualized version of equality rights in the Butler decision, or in the context of the gay and lesbian rights movement. In talking of the open character of rights, rights activist Gwen Brodsky has affirmed that the Charter “has the power to effect change,
whether that change be regressive or progressive; that is why I have devoted energy to arguing in favour of progressive interpretations.31 “Struggles between social movements are exactly about and over the power to interpret social relations. In the case of lesbians, gay men, and their opponents, the meaning of ‘family’, ‘spouse’, ‘normal’, and indeed ‘woman’ and ‘man’ are at stake.”32 Furthermore, though history is an important factor in coming to terms with the possible future possibilities, it does not preclude the emergence of previously excluded interpretations. Thus, the elevation of the equality rights onto a constitutional plane in Canada did not result in the very restrictive and de-contextualized conception that preceded them in either the United States, or in Canada under the Bill of Rights and common law.

As already mentioned, it is important to realize that any instrument which attempts to unify diverse and marginalized subject positions in an attempt to counter-hegemonically dereify and reify a dominating nodal point will necessarily be abstract enough to be ‘co-opted’ by mainstream interests. It should not be surprising, therefore, considering the unequal ‘starting positions’ that the hegemonic rights struggles in the legal arena should initially result in conservative victories outnumbering the progressive victories. Only with a critical number of the latter will the tide begin to turn; and it would be remarkably unrealistic to think it could be otherwise, as Fudge and Glasbeek seem to suggest. Moreover, it is very relevant to keep in mind how rights are interpreted by the marginalized groups vis-a-vis the mainstream groups. Though rights in the dominant legal discourse are often viewed as alienating, it should be remembered that those same symbols may have empowering and genuinely relational connotations in other legal, political, and social discourses.

However, the progressive potential of the rights discourse should not lead us to underestimate the highly constraining nature of current legal structures. And is here that we can sympathize with Fudge and Glasbeek’s frustration. In other words, we are suggesting that their critique missed its target. It is not the rights discourse, per se, which
ensures a progressive defeat. Rather, contrary to their explicit disavowals, they have misperceived the source of their frustration which, we would like to suggest, can be located in the naive belief that rights can transform overnight; that we can alter structures and definitions by simply mouthing alternatives. The point is that the rights discourse makes possible (due to its split nature and its accompanying subversive ambiguity) the loosening of structures but that this will involve a lot of hard work.

Fudge and Glasbeek condemn the rights discourse on the basis of, what they consider to be, the small number of progressive victories. However, to mistake the time and hard work invested in securing such victories and in fighting lost (but re-ignitable) battles within the last several decades for failure can only highlight their highly ahistorical critique. To expect, often-times centuries-worth, entrenched structures to change with the wave of a wand can only be considered premature and deeply idealistic.

Now, taking cognizance of the entrenching character of the legal discourse, we should, perhaps, look at it more closely. How, in other words, does contemporary legal discourse establish a certain rigidification and domination. We could say with Gabel that, upon official recognition of a new social movement’s demands, after an initial attempt at denying their legitimacy, there ensues a ‘consciousness-war’. At this stage, the political-hegemonic struggle (over ‘lived experience’ meanings) about specific nodal points (such as ‘equality’, ‘liberty’, ‘justice’, ‘right to free speech’, etc.), is reasonably fluid. However, this fluidity crystallizes as soon as a judge, for instance, delivers her decision:

During this extended period while the consciousness-war is waged with fluctuating intensity in countless microphenomenological contexts that mutually influence and totalize each other, these officials play a unique and constitutive role in equilibrating the conflict as a whole by purporting to universalize the meaning of each shift in direction through successive case-by-case revisions of what the Constitution says. They absorb what they can of the social texture of these shifts, text it for available alienated image-content, write it up as a fantasy narrative that is vaguely consistent with prior chapters, and then feed it back into the group as a whole as the official interpretation of how they, the people, believe it should ‘come out’.
Thus, the legal discourse, in its present guise at least, has the effect of not only legitimating one particular set of meanings, but also of entrenching and rigidifying such meanings through repetition. What is more, the present dominant status of the legal discourse means that such rigid fixations will serve to effect high magnitude perturbations in other discourses, where they will serve to found and legitimize further rigid nodal points. It becomes obvious, therefore, why the use of the legal arena to effect change raises the stakes to dangerous heights. It also suggests that when the use of courts is contemplated in the demand for new rights, there must also be an accompanying attempt to soften or 'de-rigidify' the relevant part of the law. Thus,

the movement’s engagement with Sate officials (its ‘legal strategy’) has got to subsume the goal of expanding its rights within a more general effort to expand its evocative appeal. It must attempt to reconstitute the very form of existing legal settings by using play, style, music, crowds, and anything else that can embody its message with enough life to erode the authoritarian quality of these settings and to get its message deeply across and deeply back in again in a way that legal arguments in their current form cannot do.  

Now, if it is accepted that all historical events are overdetermined, and that any attempt to crystallize an event or series of events into a politico-legal decision inevitably results in an underdetermined (exclusionary) outcome, then the text of such a decision will always be a product of a hegemonic articulation. And an acknowledgment of this process lays bare the radical indeterminacy that legal ideologies so successfully keep at bay. In other words, the claim that a particular legal or political outcome is determined by certain events is thus mediated not so much by logical reasoning as by a kind of political reasoning. And this realization operates to undermine these ideologies, and opens up the space necessary to introduce a multitude of new interpretive possibilities.
Now, this deconstructive commonplace can, of course, be applied at the level of political and legal philosophy. Thus, any attempt to root the political and legal forms in the mode of production with a force of finality and closure can only be hegemonic and thus not necessary. As we have already seen, it is the elevation, in the traditionally marxist discourse, of the economy as the determinate cause of all things superstructural that Laclau and Mouffe criticize:

If the concept of overdetermination was unable to produce the totality of its deconstructive effects within Marxist discourse, this was because, from the very beginning, an attempt was made to render it compatible with another central moment... namely, determination in the last instance by the economy.... If this ultimate determination were a truth valid for every society, the relationship between such determination and the conditions making it possible would not develop through a contingent historical articulation, but would constitute an a priori necessity. (HSS, 98)

The equivalential logic which connects the mode of production with the social class system which, in turn, is connected to 'society's evils' leads to the conclusion that a change in the mode of production will lead to a 'better' society. Thus, "Marxist theories of law, whether of the conspiracy [instrumental], structural determinist, or relatively autonomous varieties, all seem to be vulnerable to a critique of the primacy given to economic phenomena."37

A related criticism centres about the apparently unified agency of the working class, whereby a 'working class' person becomes identified with his or her physical being, rather than with a particular subject position in the relations of production. Thus, "the expression 'working class' is used in two different ways, to define a specific subject position in the relations of production, and to name the agents who occupy that subject position. The resulting ambiguity allows the logically illegitimate conclusion to slip through that the other positions occupied by these agents are also 'working-class positions'." (HSS, 118-119)
Fudge and Glasbeek nostalgically lament the fact that “the working-class as a distinct agency of transformation has disappeared.”³⁸ However, this should not be viewed as a negative thing. On the contrary, the abandonment of a distinct, unified, essential category can only enrich a progressive cause by cautioning against the exclusion of historically (and newly) oppressed view-points. Furthermore, abandoning the working class as the privileged challenger of the status quo does not mean that the institution of property (as presently configured) cannot be identified as a formidable barrier to effecting progressive social change. Rather, any attempt to construct such an agent should always be rooted in a specific context and its corresponding demand. We can see that, in many instances, such a demand may be articulated to a recognition that “[n]ot all social actors have access to similar resources, means of communication, and so on.”³⁹

Indeed, it would be possible to rehabilitate the agency of class, so long as it is understood as a non-unified and only precariously sutured collection of subject positions constructed through relations of production. But it is important to realize that there are a multiplicity of formidable barriers both present now and yet to appear in the unpredictable unfolding of history. A change in the nature of the economic order may affect the quality of our relationships in general. But so will a change in the nature of race, gender, and environmental relations. Thus, it becomes possible to argue that the increased concentration of private capital in the hands of fewer and fewer individuals⁴⁰ will engender certain structural constraints to be reflected in our population’s views, needs, desires, and futures. Such an argument need not, however, eclipse other factors shaping our values, nor need it take precedence. Nevertheless, there will be instances where economic inequality constitutes a barrier to improved race and gender relationships in a way that present race and gender relations do not. Thus, advocating property expropriation and redistribution may constitute a strategy in which primacy is given to economic relations, not because they are of a foundational ilk; rather because they constitute a link in our present historical configuration which, from a progressive point of
view, needs to be strengthened. Nevertheless, the strategy must be rooted in the particularity of that instance or issue. This avoids the problem of foundationalism that liberalism and traditional marxism are often accused of. For there will be instances where race or gender inequality will constitute a barrier to economic equality, or where the issue of economic equality simply does not arise. In short, any attempt to give primacy of one relation over another, unless grounded in the particularity of time and place will succumb to the entreaties of essentialism.

It is clear that the problem with the legal discourse is not only its entrenching, and rigidifying characteristics; but also its often dominating status in the field of all discourses, where it attempts to impose a one-way ratchet character upon the coupling nodal points ‘joining’ it to other discourses. It is in this latter sense that Bunting can, in the feminist context, say that “dominant discourses such as science and law have marginalized and silenced women in the guise of universal truth claims.”

[F]eminist theorists are constantly dealing with the contradictions of participating in discourses which exclude women’s voices and of risking complicity in these discourses. As Alan Hunt has argued in the context of rights struggles, “there is no doubt co-optation is always a possibility. But this is only one of the practical manifestations of the social consequences of the real world of hegemony. What needs to be stressed is that all struggles commence on old ground.”

Exposing the dominant legal and political discourses or ideologies as products of a hegemonic practice highlights the importance of deconstruction. The realization that the text of rights is largely indeterminate and open to a multiplicity of interpretations places significant importance on the study of the interaction of such ideologies as racism, sexism, and capitalism in the context of law and politics. But it also means that the judicial system’s legitimation would be jeopardized. Activist decisions would, for example, inevitably entail cutting up the budgetary pie and forcing a reallocation of
resources, something conventionally left to more democratic means (however badly functioning these may be at present). As Hutchinson puts it:

By confronting the complicity of the state in all forms of social inequality, the courts would have to take responsibility for the social conditions that resulted when its ostensibly neutral decisions combined and interacted with private activity. The distribution of wealth and power would be firmly within the judicial bailiwick and ideology inextricably on the jurisprudential docket. Without the reassuring disguise and rhetorical trappings of liberal legalism, the courts' participation in the ideological debate would be naked and, as such, an affront to traditional liberal sensibilities.

We see now the relevance of our discussion of radical democracy, where we suggested that its political project contained within it, as an internal moment, an anti-essentialist epistemology. This suggested the ineradicability of power and of the necessity of a hegemonic form of political reasoning. So what might a substantive (and hegemonic) vision of rights, and role of progressive lawyers, be?

Take, for instance, the suggestion that Charter rights (or Alternative Social Charter rights), articulated in their positive or leftist incarnations, should be adjudicated in democratically constituted forums designed to “ensure that policy-making decisions are made in as well-informed and educated a climate as possible.” This would be done by, among other things, “encouraging and mediating conversations with government from below and from above”, to provide “focus in urging and pursuing social policies that attack the causes of poverty at the source, namely seriously unequal distribution of wealth, income and control of the conditions of work” and to “scrutinize... petitions for the stories they tell about a systemic or otherwise significant deprivation of social rights.” These institutions would hold the legislatures accountable to the basic values of the social charter, but it will do so in a way profoundly different from treating rights as trumps to legislative decisions. The ASC [Alternate Social Charter] protects rights through a ‘dialogue of democratic accountability.’.... The
ASC institutionalizes rights as sites of dialogue and invites their interpretation in relational (and thus structural) terms.47

Furthermore, “not only must the interests and perspectives of members of ... [disadvantaged] sectors of society be heard within the various interpretive processes but also they [should] be institutionalized under... criteria for representation”48 so as to ensure that those actors invested with the authority to impart certain meanings to rights make an effort to seek out and listen to those affected by an interpretation. Also worth noting is first, the departure from the predominantly two-party-only, and thus restricting, court adjudications; and second, the move toward a multi-party and multi-interest form of adjudication, more congruent with the postmodern plurality of subject positions.

Implicit in this account, therefore, is the idea that rights should be equivalentially (but inessentially) linked with the metaphors of dynamic dialogue (as opposed to the trumps metaphor which evokes such notions as static and truncated dialogue) and relationship49 (as opposed to the Hayekian individualistic and alienating metaphor). “Dialogue or critical conversation is the activity wherein people create their selves and their communities; their texts and contexts.”50 And in the context of the liberal conception of the right to freedom of free speech, an emphasis on dialogue “forces an acknowledgment that harm results not simply from the silencing of certain voices, but also in allowing certain voices to dominate and operate a virtual monologue.”51

If we accept that “democratic politics is a dialogic process whereby social identities are politically articulated from cultural or discursive resources, then we must be sensitive to the critical role that mass culture plays in shaping politically salient forms of difference.”52 This observation highlights the growing importance of cultural studies in the fields of political and legal reform. It recognizes and attributes important significance to the study of the potential power that media institutions have in shaping individuals’ and society’s values and needs. In the legal context, this realization should signal the
beginning of a new attitude toward social science literature in a court-room context. And by simultaneously insisting on a positive and contextual interpretation of rights in the present judicial system we can hope to fight for, rather than simply assume, progressive results.

But let us pause for a moment and take a brief survey of frequent ‘prescriptions’ for the progressive lawyer. First, as we have just seen, there is the prescription to fight for new progressive articulations which would attach to the notion of ‘rights’. Second, to encourage and deepen the court’s capacity to make social science perturbations more palatable to the judge. Third, to prefer particular, concrete challenges over ‘neutral’ and abstract ideas of justice and rights: “If there is one motif that runs throughout the motley writings of the postmodernist crew, it is the insistence that constant attention must be paid to the time and place from which people speak.... Celebrating the specific over the general and the situated over the abstract, postmodernism particularly rejects the idea of the oracular intellectual who pronounces global truths in a universal voice.”

Fourth, “to achieve judicial decisions that heighten the status quo’s contradictions and open up space for lasting political action.” We can also adopt an attitude of ‘immanent critique’, which aims to descend the dubious heights of abstract deconstructive criticisms so that “[e]very day, in every way, [we] try to point out to the people around [us, including ourselves,] that things do not have to be the way they are.” Or, sixth, to develop the idea of Verfremdung (or exegesis), which aims to make “a belief structure visible [so that] one can destroy its power over the subjects concerned.” And, finally (and by no means exhaustively), to root oneself in the lived experience of the oppressed, i.e., to ‘look to the bottom’.

Now, how does all this square with psychoanalytic theory? In a first approach we could comment on the strong commonsense appeal that these prescriptions have for the reader. Upon closer examination, however, we find that the sense is so common to be
meaningless. We find, in other words, that these recommendations denote as many different meanings and potential applications as there are different political perspectives. It is sufficient to re-read the above list from, say, a rightist perspective. The statements are read in such a fashion as to bear out our own personal and/or political experiences (what qualifies as the 'concrete' versus the 'abstract'? What 'belief structures' deserve to be dismantled? Who qualifies as a member of the 'bottom', etc.). The statements, in and of themselves have no grip, no determinative essence. And have we not, here, exposed the scandal of the standard formula for the 'successful' astrological advice found in the columns of our daily newspapers? What we have, therefore, is not commonsense, but common nonsense. More precisely, we have a bunch of empty signifiers into which we pour our respective signifieds which, in turn, struggle to hegemonize that universal space. And barring equivalential links between such signifiers and specific instances of their application (as in, for example, the Social Charter and the particular programs it entails), little advance will be made on the progressive front.

We are beginning to glimpse how psychoanalytic theory, in the form of the logic of the signifier and the process of identification, can assist us in outlining the theoretical contours of the limits of progressive social change; for a successful advocate of progressive reform must not only have an agenda in mind, she must also be cognizant of the limits of such implementation. We will attempt to indicate, therefore, the specific contribution that psychoanalytic political theory has to make in this area. It offers us the theoretical apparatus with which to better grasp the politico-legal landscape. And we will focus our discussion around three inter-related issues: persuasion, assimilation, and strategy.
Chapter Four: The Real as an Internal Moment of the Political

Problematizing Strategy and Targeting a Radical Democratic Artegy

One way of conceiving the standard critique of the rights discourse is as a response to the fear of assimilation. But assimilation to what? Capitalism, whose conscientiously devout avatar is the ‘right’? A dominant white, heterosexual, Christian culture, whose avatar is also the ‘right’? Patriarchy?

Let us pause for a moment and recall our standard fall-back position: the subject as lack. We know that the assumption of a subject position in partial fulfillment of that lack is always traversed by an antagonism; that its presence is premised on a radical exclusion whose traces are always present but whose absence may not yet have fully been brought to the fore by the return of the real. We also know that such subject positions are only temporarily and partially sutured into what is commonly misperceived as a fully constituted, essential individual.

Now, let us return to the issue of assimilation in the context of the recent proliferation of particularisms. Many movements, especially of the nationalistic sort, have begun to unhesitatingly and ruthlessly assert their difference from a particular regional context in a bid to stave off a perceived threat of assimilation into that context. But what can such assimilation mean? Of course, there is nothing wrong in declaring one’s independence or difference from another, whether this one is a Bosnian-Serb, a religious minority, an Indian, a woman, a sexual minority, etc. The danger comes when a perceived threat incites an extreme particularism that abandons all appeals to universalism as suspect and seeks to separate itself from, and thus destroy, the context that intimates assimilation.

We immediately see the theoretical impasse that this entails. We have a case where a difference is misperceived as a positivity ‘in-itself’. In other words, the relational character of identity is not seen, ie., that assimilation and particularism denote heterogeneous, and thus antagonistic, logics each of which depends on the other for its
constitution. We see, therefore, that complete assimilation and extreme particularism are identical in their effects. The identities of the context and of the particular are both destroyed. Why? Because each identity is traversed by its antagonistic opposite, and the destruction of either means the annihilation of both. To assert one's own particularism at the expense of any universalism is thus a theoretically and practically unsound policy. But let us not forget that its appeal can and does cost lives. And "[w]hether this new relationship between universality and particularism -- grounded in the notion of rights -- will prevail or, on the contrary, be submerged by rampant xenophobia, is something that cannot be predicted. But it is clearly something worth fighting for." (MPI, 5)

Now, this does not mean that an acknowledgment that one's identity is irreducibly tied to its antagonistic Other translates into an apathetic mode whereby the oppressive Other is simply left alone in order to preserve one's own identity. Rather, it is to recognize that one's identity exists only because of the lack of our subjecthood; which means that the lack, not the specific subject position filling it, is constitutive; which means that a modification of one's identity is inevitable and, therefore, not threatening (to the subject's lack). It means that particular contents (subject positions) will become detached from their respective empty signifiers, and thus contestable and more open to change. We see, in other words, that there is always a tension between the universal and the particular. We must seize on this incommensurability and fully assume its implications so that siding with the extremes of assimilation or particularism is seen to be theoretically and ethically bankrupt. Thus, if "total integration does not occur, it is because that identity is not fully achieved: there remain unsatisfied demands concerning access to education, to employment, to consumer goods, etc. But these demands cannot be made in terms of difference; rather, they must be made on the basis of some universal principles that the [for example] ethnic minority shares with the rest of the community: the right to have access to good schools, to live a decent life, to participate in the public space of citizenship, etc." (UPI, 88)
Our discussion of assimilation and particularism is, of course, very relevant to strategy and its side-kick persuasion, for the standard notions of strategy and persuasion rely on the outdated liberal conception of an essential identity. And we have here the reason Laclau and Mouffe are uncomfortable with what Diana Fuss, Naomi Schor, and Gayatri Spivak speak of as 'strategic essentialism'. For strategy implies a fully constituted structure upon which a fully constituted identity acts without acknowledging the constitutive nature of such interaction upon the latter's identity. However, the idea it wishes to evoke, namely that we must rely on essential categories of thought in making space for a wider horizon of possibilities, is commendable. But as Mouffe points out, the notion of 'strategic essentialism' is born out of a misconception of the anti-essentialist position which portrays it as an invitation to a complete and wild nihilistic abandon. We have seen elsewhere how this misconception can only arise from a perspective which separates and essentializes order and disorder instead of treating them as antagonistic.

Let us take, now, a strategy which involves the assertion of a group's particularism. We have just seen the theoretical and practical dead end involved in a strategy whose aim is to achieve this through the destruction of the Other. But we should also not ignore the equally troublesome strategy which advocates strict adherence to difference -- a strategy which has the effect of entrenching the antagonistic split by affirming Otherness. In this instance, groups are easily seduced into believing that "people are discriminated against because they are already different when, in fact... it is the other way around: difference and the salience of different identities are produced by discrimination, a process that establishes the superiority or the typicality of the universality of some in terms of the inferiority or atypicality or particularity of others." In other words, a strategy premised on difference, at the expense of equivalence, may further serve to entrench the status quo by simply affirming, and thus inadvertently
justifying, a relation of subordination.\textsuperscript{60} (We may recall, here, the lessons we learnt in chapter two in the context of the gay movement.)

Take, for example, Martha Minow's exposition of the Great Kerchief Quarrel, in which an "international debate arose after the principal of a junior high school outside of Paris ordered three Moslem girls -- two from Morocco and one from Tunisia -- to take off their 'Islamic scarves' while in class."\textsuperscript{61} We have, here, a clear example of the assimilation versus accommodation debate reminiscent of another example we discussed concerning Sikh turbans in the context of Canada's RCMP. What should the fate be of this piece of apparel?

One of the most important observations that psychoanalytic theory has imparted is of the contingency with which any identity is formed. The question then arises, what particular subject position (whether tied to an item of clothing or not) should stand in for one's Ethnic identity whose constitution relies on its opposition to a culturally Dominant identity? We see immediately that the manner in which this question is posed presupposes the split between a signifier's particular identity and its universal identity. As soon as we assume the incommensurability of the filling function and the filler we see that a range of possible fillers emerge. The Ethnic identity (or National identity) is no longer hard-wired to a particular incarnation of it. And thereafter there can only be a political struggle among those alternatives to hegemonize the filling function. Should kerchiefs incarnate this function? Do they do so at the expense of female oppression? Will they incite violence? Will they encourage tolerance? These are hard questions which have no answers that can be justified by reference to a rational foundation.\textsuperscript{62} We can only argue politically. And here, we might examine the notion of persuasion, for what is political argument if not an attempt to persuade?

As Ernesto Laclau has shown, "the only way the process of conviction can operate is if it moves from lack of conviction to conviction, not from one conviction to
another." (PR, 289) In this case, we again see the operation of the logic of the signifier because “the valid redescription will have a split identity: on the one hand, it will be its own content; on the other, it will embody the principle of describability as such -- that is, what we have called the general form of fullness.... [There is thus a] hegemonization of the general form of describability by a concrete description.” (PR, 289)

We see, therefore, that persuasion involves a hegemonic operation which necessarily implies the presence of force, though this operation cannot be reduced to force. It means that, as a matter of progressive politics, a crucial first step involves the hystericization of the other (the person to be convinced, for instance). And this, if we recall our discussion in chapter two, implies creating the circumstances (ie., engaging the analytic discourse) by which the lack in the other emerges. Can we not see the significance, therefore, of the two-step approach, suggested by Zizek, to ideological critique?

We must not only expose the overdetermined and conflicting content of the (heterosexual) Social symptom (‘queer’). But we must also reveal its contingent nature; that it could just as easily have been ‘straight’; so that we can identify with what was the symptom but is now transformed, by virtue of its displayed contingency, to what Lacan calls the sinthome, ie., that we, as ‘straight’ are ‘queer’. It is only upon such a successful ideological critique that we can enter the domain of hegemonic persuasion.

What we must bear in mind, however, is that these prescriptions, unlike the ones above we sampled from progressive legal scholarship, are rooted not in some nebulous common sense, but in the basic laws of the signifier. Our effort to define more precisely the progressive task would, in this view, be akin to abandoning (at least in theory) common sense appeals to such notions as ‘objects thrown into the sky eventually fall to the surface’ and replacing it with (or making it a particular instance of) Newton’s inverse square laws.
But again, how one goes about interpreting the symptom, crossing the fantasy, and identifying with the *sinthome* is very much a question of circumstance. This task would constitute the epistemological internal moment of a progressive radical democratic politics. The next moment of the project would consist in advocating a substantive vision as a possible filler for the surfaced lack, and rather than doing so aggressively, presenting such fillers as other ‘better’ options which had, until then, been radically excluded. (We see here the reason Lacan constantly chided the ego-psychologists. According to Lacan, the psychoanalytic encounter was supposed to be one in which the patient is hystericized and forced to produce his or her own master signifiers, and not to have them imposed by the analyst’s ego ideal.)

As a corollary, we could say that the politico-hegemonic nature of such an operation is such that there can never be any guarantees. Unforeseeable events constantly subvert even the most carefully planned strategies. And part of the ethics of the real is the willingness to affirm the (contingent) consequences no matter how hard one struggles. There simply is no formula for success. Indeed, we have seen even Judith Butler come to this realization by suggesting as too idealistic her aspiration in *Gender Trouble* to a programmatic formula of parodic repetition (for the purposes of progressive subversion). There is always the risk that an attempt to reinscribe a signifier in a new context will merely reinforce its previous context.

With the logic of the signifier in mind we can now more confidently assert how an ethics of the real might figure as an internal moment of the progressive lawyer’s agenda. Interpreting the symptom would involve an analytical effort to uncover how, for example, ‘woman’, or ‘family’ is already overdetermined. This means abandoning any pretense of an apolitical and objective legal process with its claim to authoritatively ‘natural’ and ‘inevitable’ outcomes. Crossing the fantasy (‘showing’ the historicity of being) would involve (Foucauldian) archaeological and genealogical efforts to expose the contingent nature of the definitional process. The historical analysis would also orient itself toward
the future such that "victories encoded in the law...[are] preserved in order to keep alive the memory of the past, the struggle in the present, and the hope for the future." This double operation would encourage the identification, on the part of the oppressor and oppressed, with the contingency of their being and, therefore, with the lack that continuously propels us to assume more and more subject positions.

As to what previously excluded traits should be present in the prelude to a renewed hegemonic struggle, this will necessarily entail a judgment call by the lawyer. It will depend on the client, the legal procedures in place, the particular judge, the likelihood of appeal, etc., etc. In other words, the difficult questions do not disappear. Should, for instance, a progressive lawyer argue that her lesbian client behaves like a heterosexual so that her rights to custody are not withdrawn? It should be very clear that this cannot be answered in advance. Every case must be tackled on its own terms, but what we can say is that at every opportunity, there must be an effort to reveal and maintain the split of the signifier. And this, as we have argued, can most forcefully be done through the rights discourse.

Finally, what should we call such progressive operations? In the wake of the outdated modernist notion of 'strategy', what can we put in its postmodern place? In a first approach, we would like to suggest the idea of play, because it is through a willingness to experiment without preconceptions about outcomes that we 'realize' who we are, interrogate who we are, construct who we are. But we would also like to suggest the seriousness with which such play should be approached, for it is the process of such identifications that defines us, fixes us, and sets us up for inevitable and tragic dis-identifications (separations). In this sense we could say we engage in a tragic play. So, keeping these ideas in mind, we might propose the idea of progressive politics as an art form, as artegy. Why? Because art is not only playfully disruptive of old selves and creative of new ones -- it is also constitutive. We observe that, through it, we are
transformed, so there is also an acknowledgment of the notion of fluid identity. And, though we are always confined by our space, time, and the raw materials available (the floating signifiers), we can never determine, in advance, the particular art form that will constitute us. Thus, there is an acknowledgment of contingency -- an arrow of painful and undecidable jouissance that marks us as tragic subjects and points toward an ethical art of separation. And finally, progressive politics as artegy means the imagination is the limit. Artegy suggests a real mutation in the notion of strategy, whose presupposition of fully-constituted identities must be abandoned. It evokes the simultaneous presence of tragedy and vital energy.

Progressive lawyers and legal academics are not only limited by their prescribed roles which seemingly confine them to a repetitive and entrenching necessity of humdrum life. They are also enabled by them. (So, lets go do some serious artegizing!)
Notes to Chapter Four

2 This, of course, applies to the main feature that characterizes the difference between humans and animals.
4 The *respublica* “is the articulation of a common concern that the pursuit of all purposes and the promotion of all interests, the satisfaction of all wants and the propagation of all beliefs shall be in subscription to conditions formulated in rules indifferent to the merits of any interests or the truth or error of any belief and consequently not itself a substantive interest or doctrine” (RP, 68), quoting from Oakeshott, Michael, *On Human Conduct* (Oxford, 1975) at 203.
8 Copjec, ‘The Sartorial Superego’, *supra* at 84-85.
9 Copjec relates this observation to the concept of free will:

   It is freedom itself that is reconceptualized by the psychoanalytic concept of will: the subject’s only freedom consists precisely in its ability to disregard or free itself from all circumstances, causes, conditions, all promises of reward or punishment for its actions. The subject determines itself not by ‘choosing’ its own good (an illusory freedom, since the good determines the choice, not the other way around), but by choosing not to be motivated by the conditions that define its self-interest and thus by acting contrary to its own good — even to the point of bringing about its own death.

   It will be obvious to many that Freud was not the first to define the freedom of the ethical subject in this negative way as the ability to resist the lure, the conditions, of the pleasure principle and to submit oneself freely to the death drive. Kant paved the way for psychoanalysis by placing the ethical imperative in a realm radically beyond the phenomenal and thus by splitting the subject between two realms, one subject to the determinations of historical conditions, the other not.

Copjec, Joan, ‘The Sartorial Superego’, *supra* at 80. In further specifying the nature of the subject in its relation to the social, Copjec writes that it is not the case that “the subject is ‘asocial’ in the sense of being prior or purely external to the structure, but rather to insist that the division ‘between’ the subject and society is internal to society itself”: Copjec, ‘Subject Defined by Suffrage’ (1993) 7 Lacanian Ink 47 at 53.
10 Copjec, Joan, ‘The Sartorial Superego’, *supra* at 75.
12 And is this not what we find in today’s late capitalistic society where the number of desires not to be desired are growing exponentially without a requisite pacifying Law (desire to desire)? For we must not smoke, we must not overeat, we must not be overweight, we must not offend, etc.
13 Copjec, Joan, ‘The Sartorial Superego’, *supra* at 78-82.
15 Salecl, Renata, ‘Cogito, its Rights and Fantasy’, *supra* at 108.
16 It is their ignorance of this crucial dimension that prevents liberals from overcoming their impasse of cultural diversity (some people believe in equality) v. Rationality and Reason (humans are equal): Salecl, ‘Woman as Symptom of Rights’, *supra* at 93.
17 Salecl, ‘Cogito, its Rights and Fantasy’, *supra* at 116-117.

Why, then, might people perceive actions which endeavour to ensure freedom and equal possibilities for everybody as an intrusion into their freedom and privacy? The answer is *fantasy*: as long as liberal theory is postulated upon the exclusion of fantasy, upon the negation of the particular way people organize their jouissance, it will have to come to
terms with the reality that its 'goodness' may be perceived as 'hostility'. The paradox is therefore that, on account of its exclusion of fantasy, the formal, purely symbolic character of the Rawlsian 'original position' engenders the very effects it endeavours to preclude.

Ibid. at 118.

18Chantal Mouffe suggests that this is the case, to a certain extent, among such postmodernists as Foucault and Lyotard (RP, 77-78).

19"[T]he public/private distinction is not abandoned, but is constructed in a different way. The distinction does not correspond to discrete, separate spheres; every situation is an encounter between 'private' and 'public' because every enterprise is private though never immune from the public conditions prescribed by the principles of citizenship. Wants, choices and decisions are private because they are the responsibility of each individual, but performances are public because they have to subscribe to the conditions specified by a particular understanding of the ethico-political principles of the regime which provide the 'grammar' of the citizen's conduct." (RP, 84)

20"The whole false dilemma of equality-versus-difference is exploded since we no longer have a homogeneous entity 'woman' facing another homogeneous entity 'man', but a multiplicity of social relations in which sexual difference is always constructed in very diverse ways and where the struggle against subordination has to be visualized in specific and differential forms. To ask whether women should become identical to men in order to be recognized as equal, or whether they should assert their difference at the cost of equality, appears meaningless once essential identities are put into question." (RP, 78)


22The res publica "is the articulation of a common concern that the pursuit of all purposes and the promotion of all interests, the satisfaction of all wants and the propagation of all beliefs shall be in subscription to conditions formulated in rules indifferent to the merits of any interests or the truth or error of any belief and consequently not itself a substantive interest or doctrine" (RP, 68), quoting from Oakeshott, Michael, On Human Conduct (Oxford, 1975) at 203.

23Laclau and Mouffe, supra at 183-184.

24Alternative appellations include, for example, 'salad bowl' (see Minow, Martha, 'Identities' (1991) 3 Yale Journal of Law & the Humanities 97 at 123), 'mosaic', etc.

25We must be careful, however, to recognize the limits of this analogy. For instance, it is not readily amenable to the notion of 'visibility' whereby the struggle between competing pattern configurations becomes fully transparent. In other words, it is not flexible enough to permit a kind of 'crossing of the fantasy' which would reveal the pattern's historicity.


27Fudge, Judy, and Harry Glasbeek, 'The Politics of Rights: A Politics with Little Class' (1992) 1 Social and Legal Studies 45 at 52-56.

28Fudge and Glasbeek, supra at 55.


30Herman, Didi, 'Beyond the Rights Debate' (1993) 2(1) Social and Legal Studies 25. See also her Rights of Passage: Struggles for Lesbian and Gay Legal Equality (Toronto: University of Toronto, 1994).

31As quoted in Herman, 'Beyond the Rights Debate', supra at 35.

32Herman, 'Beyond the Rights Debate', supra at 38.

33In the Althusserian sense of the term.


35Ibid. at 1598.

36As Boyle puts it: "Law has no interior rationality; nothing in the rules themselves dictates any particular result. But content enters law through the back door, not through the pure linguistic connections envisaged by formalist theory but through the limitations imposed by a deeply political set of assumptions about the social world": Boyle, Jamie, 'The Politics of Reason' (1985) 133 U. of Penn. Law Rev. 685 at 728.

37Boyle, supra at 730.

38Fudge and Glasbeek, supra at 62.

39Herman, 'Beyond the Rights Debate', supra at 36.
Chapter Four: The Real as an Internal Moment of the Political

40 Fudge, ‘Community or Class: Political Communitarians and Worker’s Democracy’ in Hutchinson, Allan, and Leslie J. M. Green, eds., Law and the Community: The End of Individualism? (Toronto: Carswell, 1989) at 71-72.


42 Bunting, supra at 842.

43 Cf. the Candiand decision Ref. Re Manitoba Language Rights which had the effect of forcing the provincial government to spend millions of dollars on translation fees, despite apparent indifference by the majority of the French speaking population. The Brown v. Education case ((1954) 347 U.S. 483), which called for desegregation, is another example from American jurisprudence in which such new budgetary pie slicing was imposed upon the government by the unelected and unaccountable. Despite these examples, however, it seems unlikely, though not impossible, that judges will take seriously the idea of “an empathetic encounter and act upon the vocal challenge of previously excluded perspectives. Rather, it is likely to be used as one more device to reinforce and legitimate the illusion of a privileged reality and vision of justice”: Hutchinson, Allan, ‘Inessentially Speaking’ (1991) 89 Michigan Law Review 1549 at 1566-1567.

44 Hutchinson, Allan, ‘From Liberal Chatter to Democratic Conversation’, in Hutchinson and Green, supra at 164. See also Hutchinson, ‘Democracy and Determinacy: An Essay on Legal Interpretation’ (1989) 43 University of Miami Law Review 541 at 575. By pointing out the untenability of a consensus theory of adjudication (whether in its naturalist or positivist guise), Petter and Hutchinson feel that the courts’ resolution of fundamentally social or political conflicts on the basis of community values (“whether they are conflicts within rights, between rights, or between rights and competing social interests”) will be exposed as “profoundly unconvincing”. Petter, Andrew, and Allan Hutchinson, ‘Rights in Conflict: The Dilemma of Charter Legitimacy’ (1989) 23 U.B.C. Law Review 531 at 546.

45 Ie., by emphasizing that statutes, the common law, regulations, policies, and practice are to be interpreted and applied with a view to ‘alleviating and eliminating social and economic disadvantage’ and to ensure “well-being and full, equal membership in the community”: see Nedelsky, Jennifer, and Craig Scott, ‘Constitutional Dialogue’, in Bakan, Joel, and David Schneiderman, eds., Social Justice and the Constitution (Ottawa: Carleton University Press, 1992) at 72-73.

46 Nedelsky and Craig., supra at 65-67. Such a Social Charter would, it has been suggested, have an override provision similar to the present s.33 of the Charter of Rights and Freedoms, but which would not permit prospective overriding in omnibus fashion. Rather, it would restrict such overrides to after-the-fact instances. Furthermore, according to such a social charter, “the Supreme Court of Canada [would be] the only court capable of reviewing decisions and orders of the tribunal, and only on the grounds of a “manifest excess of jurisdiction”: Nedelsky and Craig., supra at 68.

47 Nedelsky and Craig, supra at 76-77.

48 Nedelsky and Craig, supra at 73.

49 In a move in danger of succumbing to the entreaties of essentialism, Robin “West suggests that women’s lives exemplify their actual or potential connectedness to others, ‘both materially, through pregnancy, intercourse, and breast-feeding, and existentially, through the moral and practical life’”: Goldfarb, Phillis, ‘From the Worlds of ‘Others’: Minority and Feminist Responses to Critical Legal Studies’ (1992) 26 New England Law Review 683 at 700.

50 Coombe, Rosemary, ‘Publicity Rights and Political Aspiration: Mass Culture, Gender Identity, and Democracy’ (1992) 26 New England Law Review 1221 at 1276. Though Hutchinson is pessimistic about the utility of the rights discourse in the realization of progressive ends, he is quick to eulogize dialogue as a the most conducive means for change: “By adopting such a dialectical view of the relations between language, social action, and individual intentionality, attention shifts from individuals to the circumstances of their dialogic and constitutive interactions. Conversation and connection become important in themselves and not simply as a means to the personal end of self-expression”: Hutchinson, ‘From Liberal Chatter to Democratic Conversation’, supra at 168.

51 Hutchinson, ‘From Liberal Chatter to Democratic Conversation’, supra at 172.

52 Coombe, supra at 1279-1280.

53 Hutchinson, ‘Inessentially Speaking’, supra at 1569.

54 Hutchinson, ‘Inessentially Speaking’, supra at 1568.

55 Boyle, supra at 737.

56 Boyle, supra at 746.


60We should note, also, that a strategy of pure difference may not only be unproductive with respect to a minority group’s effort to have its demands responded to. It may also operate within the group itself to create an atmosphere of intolerance and fear. We saw this played out very clearly in the context of the feminist movement and the invocation of ‘experience’ under the banner of the ‘personal is political’ to censor voices that did not conform to ‘true’ feminist experiences. This is referred to by Joan Scott:

In much current usage of ‘experience’, references to structure and history are implied but not made explicit; instead, personal testimony of oppression replaces analysis, and this testimony comes to stand for the experience of the whole group. The fact of belonging to an identity group is taken as authority enough for one’s speech; the direct experience of a group or culture — that is, membership in it — becomes the only test of true knowledge.

The exclusionary implications of this are twofold: all those not of the group are denied even intellectual access to it, and those within the group whose experiences or interpretations do not conform to the established terms of identity must either suppress their views or drop out. An appeal to ‘experience’ of this kind forecloses discussion and criticism and turns politics into a policing operation: the borders of identity are patrolled for signs of nonconformity; the test of membership in a group becomes less one’s willingness to endorse certain principles and engage in specific political actions, less one’s positioning in specific relationships of power, than one’s ability to use the prescribed languages that are taken as signs that one is inherently ‘of’ the group. That all of this isn’t recognized as a highly political process that produces identities is troubling indeed, especially because it so closely mimics the politics of the powerful, naturalizing and deeming as discernibly objective facts the prerequisites for inclusion in any group.

Indeed, I would argue more generally that separatism, with its strong insistence on an exclusive relationship between group identity and access to specialized knowledge (the argument that only women can teach women’s literature or only African-Americans can teach African-American history, for example), is a simultaneous refusal and imitation of the powerful in the present ideological context.

Scott, Joan, ‘Multiculturalism and the Politics of Identity’ (1992) 61 October 12 at 18-19. See also Sandra Harding who cites “the depressing and counterhistorical consequences that whites cannot create anti-racist knowledge, men cannot create anti-sexist knowledge, etc. — in short, that no one can ever learn anything from anyone else’s experience”: Harding, Sandra, ‘Subjectivity, Experience and Knowledge: An Epistemology from/for Rainbow Coalition Politics’ (1992) 23(3) Development and Change 175 at 178. In support of the view that anyone has the ability to develop counterhegemonic knowledges, she attempts to draw a distinction between speaking as or for a subject position and speaking about or with or in support of a marginalized subject position: Ibid. at 188-189.


62As to how the actual dispute resolved itself, in citing a report by Diana Johnstone (“‘Great Kerchief Quarrel’ French United Against “Anglo-Saxon Ghettos”’ (Jan. 24-30, 1990) These Times 10-11) Minow tells us that “the two Moroccan girls returned to school without their kerchiefs because ‘King Hassan II of Morocco had sent word to their fundamentalist father that his majesty did not appreciate seeing his subjects draw so much adverse attention abroad. It was a paradoxical victory for the authoritarian approach’”: Ibid. at 125.

63Elsewhere, Laclau suggests that persuasion

is an essentially impure notion. One cannot persuade without the other of persuasion — that is, force. One can speak of the force of persuasion, but one would never say that one has been persuaded of the correctness of the Pythagorean theorem. The latter is simply shown, without any need for persuasion. But one cannot say either that persuasion is simply reducible to force. Persuasion is the terrain of what Derrida would call a 'hymen'. It is the point in which the ‘reasons’ for a belief and the ‘causes’ of the belief constitute
an inseparable whole.... Now, as Chantal Mouffe and I have argued in *Hegemony and Socialist Strategy*, there is a name in our political tradition that refers to this peculiar operation called persuasion, which is only constituted through the inclusion, within itself, of its violent opposite: this name is 'hegemony'. (CIP, 92-93)

Concluding Remarks

This century’s stupendous technological advances and socio-political turmoils have led to an unprecedented proliferation of dislocations. And it should come as no surprise to find our legal and political institutions feeling the strain. After all, they both define, and are defined by, the ebb and flow of the line that separates the social from the political.

Evidencing this trend are the growing number of new social movements: feminism, critical race, anti-poverty, environmentalism, etc. We find that dislocations give rise to new ideals which, in turn, serve as rallying centres for social change. But, in contemplating such ideals, we are led to consider what the limits are to such change.

Our thesis suggested that the limits to progressive social change coincide with the limits of strategy and the limits of modernism, for they can each be said to be special cases of, and thus exemplify, the limits of discourse. In this view, the arrival of postmodernism and poststructuralism on the contemporary theoretical scene can be seen as an attempt to announce these limits -- limits which were, for so long, repressed by a modernist ideology of God, Truth, and Reason.

But why, we might ask, has this theoretical ‘mutation-in-progress’ chosen to mark its presence now? The answer to this question can be located at a precise historical moment and will return us to our opening statement: the increased rates of development brought on by our late capitalistic societies.

We argued that such rates of social change have produced a new common nonsense of uncertainty and undecidability. The severely shortened life-times of
social and political objects are now displacing an old commonsense of certainty, predictability, tradition -- a displacement made possible by the glaring openness of the social.

Central to our thesis and to this new common(non)sense is the category of contingency. This suggests that events not only rely on each other for the unfolding of a history; they are also overdetermined: each cannot be logically deduced or determined by the other. In other words, we find contingency residing in the heart of every necessity.

Now, the rise of contingency means that the space is opened up for a critique of the status quo. In the face of a growing and persistent interrogation of existing institutional structures, social change becomes more easily conceivable. However, there is a dark underbelly to this good fortune. A blatant and raw exposure to irreducible uncertainty is a social development that marks the onset of anxiety that can easily be seen as threatening. Against a historical background of Order, this new arrival intimates Disorder. This is why we argued that a more precise theorization of the new common(non)sense is crucial. And it is here that a Lacanian psychoanalytic theory offered us critical guidance.

We suggested that the absence of a model that deepens our understanding of the constitutive nature of undecidability and antagonism can quickly lead us to reach for an Order -- any Order. Here lurks the totalitarian temptation embodied so tragically in the rise of new nationalisms and religious fundamentalisms. The recent call to develop a theory of radical democracy should be seen as an effort to stave off this temptation.

We argued that the central ingredient of totalitarianism resides in its essentialism. Essentialism also provided us with a target for our critique of liberalism and traditional marxism. We showed how Lacan’s tri-partite onto-epistemology (comprising the imaginary, symbolic, and real orders) assisted us in developing a critique of liberalism, communitarianism and their variants. But it also suggested a third alternative: a (postmarxist) radical democracy, whose project includes, as its internal moment, an anti-
essentialist sensibility. We could even say that the essentialist versus anti-essentialist debate was an omnipresent theme running through our thesis.

Psychoanalysis offers us an incredibly powerful onto-epistemological framework that yields theoretical insights in issues ranging from the subject/structure dichotomy to power relations to structural constraints. Also of central importance to current legal and political theory are processes of identity formation, especially in the context of the rights discourse. We showed how Lacan’s notion of the subject as lack assisted us in reconceiving the process of identification, thus forcing a critical departure from notions of a rational, fully constituted, and sutured (communitarian) Social or (liberal) Individual.

It is no longer sufficient to rely on rationalistic or essentialist notions of what is Good (as the traditional marxists argue) or Right (as the liberals argue). Rather, we must attempt to repeatedly reinscribe the nettle of undecidability which forever escapes our grasp: the objet petit a. We suggested that, among few others, Slavoj Zizek, Ernesto Laclau, Chantal Mouffe, Joan Copjec, and Renata Salecl, offer us the most sophisticated theoretical apparatus thus far to undertake this task.

Our thesis presented and developed their work to show how discursive events can be convincingly explained using Lacan’s ‘laws of the signifier’, just as physical phenomena can be explained using Newton’s or Einstein’s laws of motion. We found that, in conjunction with Lacan’s theory of desire, the rights debate was injected with a much-needed boost of fresh blood. Of particular significance here were the notions of the split signifier and the split subject. With these new concepts we were able to more accurately point to the limits of what is possible in the context of a transformative politics.

Finally, our thesis showed how the laws of the signifier can offer us not only an unparalleled explanatory framework, but also a paradoxical ethics (of the real). Though this version of an ethics permeated the whole of our work, we also attempted to draw out
the implications for progressive legal professionals and academics. We suggested that
progressive politico-legal practice should be viewed as an ethical *art form*.
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Appendix: Lacan’s Graph of Desire

In effect, Lacan’s essay ‘The Subversion of the Subject and the Dialectic of Desire in the Freudian Unconscious’ (E, 292), in which he presents his graph of desire, is an attempt to focus and further theorize upon that ‘little piece of the real’ which escapes the signification process: the objet petit a.

We may begin with Lacan’s ‘elementary cell’ which attempts to encapsulate the mechanics of the point de capiton (ie., the master signifier, or anchoring point) (E, 303):

As Zizek points out, the point de capiton “is the point through which the subject is ‘sewn’ to the signifier, and at the same time the point which interpellates individual into subject by addressing it with the call of a certain master-signifier (‘Communism’, ‘God’, ‘Freedom’, ‘America’).” (SO, 101) He goes on:

A crucial feature at this elementary level of the graph is the fact that the vector of the subjective intention quilts the vector of the signifier’s chain
backwards, in a retroactive direction: it steps out of the chain at a point preceding the point at which it has pierced it. Lacan's emphasis is precisely on this retroactive character of the effect of signification with respect to the signifier, on this staying behind of the signified with respect to the progression of the signifier's chain: the effect of meaning is always produced backwards, *apres coup*. Signifiers which are still in a 'floating' state -- whose signification is not yet fixed -- follow one another. Then, at a certain point -- precisely the point at which the intention pierces the signifier's chain, traverses it -- some signifier fixes retroactively the meaning of the chain, sews the meaning to the signifier, halts the sliding of the meaning.

To grasp this fully, we have only to remember the ... example of ideological 'quilting': in the ideological space float signifiers like 'freedom', 'state', 'justice', 'peace'... and then their chain is supplemented with some master-signifier ('Communism') which retroactively determines their (Communist) meaning: 'freedom' is effective only through surmounting the bourgeois formal freedom, which is merely a form of slavery; the 'state' is the means by which the ruling class guarantees the conditions of its rule; market exchange cannot be 'just and equitable' because the very form of equivalent exchange between labour and capital implies exploitation; 'war' is inherent to class society as such; only the socialist revolution can bring about lasting 'peace', and so forth. (Liberal-democratic 'quilting' would, of course, produce a quite different articulation of meaning; conservative 'quilting' a meaning opposed to both previous fields, and so on.) (SO, 101-102)

In other words, ideological anamorphosis (or transference) sets in when we believe that 'freedom', 'state', or 'war' have an 'inherent' or 'essential' meaning; that they can be defined without a circular and tautological reference to a master-signifier whose effect is to fix the meaning of these 'floating signifiers' and whose consistency is guaranteed by the symbolic code of the big Other.

We can now move on to Lacan's completed graph of desire. It should be apparent how his 'elementary cell' is reproduced at the two levels structured vertically, one atop the other.
In a first approach, we will focus on the lower half of the graph (the level of meaning): $\rightarrow O \rightarrow s(O) \rightarrow I(O)$. Here, the vector of intention intercepts the signifier's diachronic progression (as in a sentence) at the big Other. It is here that our unconscious memory is accessed for the appropriate code (structured by master signifiers) whose retroactive application fixes the meaning of the preceding 'floating signifiers'. This is why the second point of intersection is marked s(O), i.e., the signified is always a function of the big Other.

It is important to note, however, that the generation of meaning is not accomplished simply by a single stroke of retroaction. It is more complicated than this, involving a circular to-and-fro movement of anticipation and retroaction (E, 304) leading up to a final (retroactive) guarantee made possible "through [a final] reference to the synchronous symbolic code" (SO, 103), i.e., the big Other.

It will be noted that the subject, $\$, is now to be found as the source of the vector of intention, and the subject's symbolic identification, I(O), at the vector's terminus. Why this switch (vis-a-vis the elementary cell)? It is simply an articulation of the illusion that takes hold of us upon the onset of retroactive signification. It is a "retroversion effect
by which the subject becomes at each stage what he was before and announces himself” (E, 306) as what he always already was. (SO, 104) This transferential misrecognition is precisely the result of the vector i(o)→e which short circuits, and thus conceals, the true nature and operation of the big Other. Thus, the ideological imaginary identification¹, i(o), must be sharply distinguished from symbolic identification².

As Zizek notes, Jacques-Alain Miller has traced the constant reference to such a distinction in Lacan’s work. (SO, 110) He explains the difference: “imaginary identification is identification with the image in which we appear likable to ourselves, with the image representing ‘what we would like to be’ [ie., the ideal ego -- LJG], and symbolic identification, identification with the very place from where we are being observed, from where we look at ourselves so that we appear to ourselves likable, worthy of love [ie., the ego-ideal -- LJG].” (SO, 105) A couple of caveats, however:

First, the feature, the trait on the basis of which we identify with someone, is usually hidden -- it is by no means necessarily a glamorous feature....

....

+[S]econd,...[one must not] overlook the fact that imaginary identification is always identification on behalf of a certain gaze in the Other. So... the question to ask is: for whom is the subject enacting this role? Which gaze is considered when the subject identifies himself with a certain image? (SO, 106)

It is thus through the circular to-and-fro movement between imaginary and symbolic identifications that a subject becomes “integrated into a given socio-symbolic field” (SO, 110); that she adopts certain socio-symbolic mandates. The important thing to notice is that this mechanism by which the individual is (retroactively) interpellated into subject is not as smooth and clean cut as it seems: there is always a gap or leftover that serves to unsettle the subject. This unsettling effect is strongest and most manifest in the hysterical subject who, faced with the big Other’s edict to assume a symbolic mandate (‘you are my master, my wife, my king’), must ask the big Other ‘Che Vuoi?’ (E, 312), a question whose variations can be partially listed as “‘You’re telling me that, but what do you want with it, what are you aiming at?’,” (FC, 214; SO, 111) ‘what do you really want?’, ‘‘why am I what I’m supposed to be, why have I this mandate?’, ‘why am I...a teacher, a master, a king...?’, “what is it in me that makes me the...wife, the king?” (LA, 131) Briefly: ‘Why am I what you the big Other are saying that I am?” (SO, 113). Che Vuoi? aims to discover what the desire of the big Other is (in the subjective genitive sense, ie., what is the big Other’s desire?). “The hysterical question opens the gap of what is ‘in the subject more than the subject’, of the object in subject which resists
interpellation -- subordination of the subject, its inclusion in the symbolic network.” (SO, 113)

It is Che Vuoi?, then, that brings us to the upper level of the graph of desire (the level of enjoyment) in which the vector of jouissance (enjoyment) intersects the vector of the symbolically structured desire. It constitutes the subject’s attempt at answering this question; of dealing with the surplus (the little piece of the real) that escapes the signification process. “If the Name-of-the-Father functions as the agency of interpellation, of symbolic identification, the mother’s desire, with its fathomless ‘Che vuoi?’, marks a certain limit at which every interpellation necessarily fails.” (SO, 121)

The most troubling aspect of this desire of the Other (d) is that the question betrays a certain want, a certain lack. This is what Lacan calls the lack of the Other, S(Ø). It is this lack that gives rise to Che Vuoi?, and it is the function of fantasy (SØa) to conceal the Other’s void. In the case of anti-Semitism, for example, “the answer to ‘What does the Jew want?’ is a fantasy of ‘Jewish conspiracy’: a mysterious power of Jews to manipulate events, to pull the strings behind the scenes.” (SO, 114)

The crucial point that must be made here on a theoretical level is that fantasy functions as a construction, as an imaginary scenario filling out the void, the opening of the desire of the Other: by giving us a definite answer to the question ‘What does the Other want’, it enables us to evade the unbearable deadlock in which the Other wants something from us, but we are at the same time incapable of translating this desire of the Other into a positive interpellation, into a mandate with which to identify. (SO, 114-115)

The issue, therefore, that plays itself out at this level of the graph, and here we shall conclude, concerns

what happens when this very field of the signifier’s order, of the big Other, is perforated, penetrated by a pre-symbolic (real) stream of enjoyment -- what happens when the pre-symbolic ‘substance’, the body as materialized, incarnated enjoyment, becomes enmeshed in the signifier’s network.

Its general result is clear: by being filtered through the sieve of the signifier, the body is submitted to castration, enjoyment is evacuated from it, the body survives as dismembered, mortified. In other words, the order of the signifier (the big Other) and that of enjoyment (the Thing as its embodiment) are radically heterogeneous, inconsistent; any accordance between them is structurally impossible. This is why we find on the left-hand side of the upper level of the graph -- at the first point of intersection between enjoyment and signifier, S(Ø) -- the signifier of the lack in the Other, of the inconsistency of the Other: as soon as the field of the signifier is penetrated by enjoyment it becomes inconsistent, porous,
perforated -- the enjoyment is what cannot be symbolized, its presence in the field of the signifier can be detected only through the holes and inconsistencies of this field, so the only possible signifier of enjoyment is the signifier of the lack in the Other, the signifier of its inconsistency.

....[This is why, as we descend the upper level of the graph from the right hand side from S(Ø), we encounter $\phi a$ -- LJG]: the function of fantasy is to serve as a screen concealing this inconsistency; finally s(O), the effect of signification as dominated by fantasy: fantasy functions as 'absolute signification' (Lacan); it constitutes the frame through which we experience the world as consistent and meaningful -- the a priori space within which the particular effects of signification take place. (SO, 122-123)
Notes to Appendix

1 Imaginary identification is alienating because it involves the adoption of an other’s (o) image (i), whether this image is one constructed visually via imagoes or symbolically via signifiers: “This imaginary process... begins with the specular image and goes on to the constitution of the ego [e] by way of subjection by the signifier.” (E, 307)

2 Symbolic identification refers to the “identification of the subject with some signifying feature, trait (I), in the big Other, in the symbolic order [ie., O].” (SO, 104)

3 Cf. the hysterical Mary in Rossetti’s painting ‘Ecce Ancilla Domini’, or the hysterization of Christ in Scorsese’s ‘The Last Temptation of Christ’. (SO, 114) Both subjects ask the same question: ‘Why me?’

4 Cf. Shakespeare’s Hamlet in which the imposed mandate (by the ghost of Hamlet’s father) to avenge his father’s death is subverted by the supplementary instruction not to harm his mother. It is she, therefore, who triggers, for Hamlet, the Che Vuoi? (SO, 120)

5 An important caveat:

The usual definition of fantasy (‘an imagined scenario representing the realization of desire’) is therefore somewhat misleading, or at least ambiguous: in the fantasy-scene the desire is not fulfilled, ‘satisfied’, but constituted (given its objects, and so on) — through fantasy, we learn ‘how to desire’. In this intermediate position lies the paradox of fantasy: it is the frame co-ordinating our desire, but at the same time a defence against ‘Che vuoi?’, a screen concealing the gap, the abyss of the desire of the Other. Sharpening the paradox to its utmost -- to tautology -- we could say that desire itself is a defence against desire: the desire structured through fantasy is a defence against the desire of the Other, against this ‘pure’ trans-phantasmic desire (ie., the ‘death drive’ in its pure form).

We can now see why the maxim of psychoanalytic ethics as formulated by Lacan (‘not to give way on one’s desire’) coincides with the closing moment of the psychoanalytic process, the ‘going through the fantasy’: the desire with regard to which we must not ‘give way’ is not the desire supported by fantasy but the desire of the Other beyond fantasy. ‘Not to give way on desire’ implies a radical renunciation of all the richness of desires based upon fantasy-scenarios. In the psychoanalytic process, this desire of the Other assumes the form of the analyst’s desire: the analysand tries at first to evade its abyss by means of transference — that is, by means of offering himself as the object of the analyst’s love; the ‘dissolution of transference’ takes place when the analysand renounces filling out the void, the lack in the Other.

... [And] how does an empirical, positively given object become an object of desire; how does it begin to contain some X, some unknown quality, something which is ‘in it more than it’ and makes it worthy of our desire? By entering the framework of fantasy, by being included in a fantasy-scene which gives consistency to the subject’s desire. (SO, 118-119)

6 As to the formula for drive, $\phi D$:

Perhaps we should take a risk and read $\phi D$ retroactively, from Lacan’s later theoretical development, as the formula for sinhome: a particular signifying formations which is immediately permeated with enjoyment — that is, the impossible junction of enjoyment with the signifier. Such a reading gives us a key to the upper level, to the upper square of the graph of desire in its opposition to the lower square: instead of imaginary identification (the relation between imaginary ego and its constitutive image, its ideal ego) we have here desire (d) supported by fantasy ($\phi a$); the function of fantasy is to fill the opening in the Other, to conceal its inconsistency — as for instance the fascinating presence of some sexual scenario serving as a screen to mask the impossibility of the sexual relationship. Fantasy conceals the fact that the Other, the symbolic order, is structured around some traumatic impossibility, around something which cannot be
symbolized — i.e., the real of jouissance: through fantasy, jouissance is domesticated, 'gentrified' — so what happens with desire after we 'traverse' fantasy? Lacan's answer, in the last pages of his Seminar XI, is drive, ultimately the death drive: 'beyond fantasy' there is no yearning or some kindred sublime phenomenon, 'beyond fantasy' we find only drive, its pulsation around the sinthome. 'Going-through-the-fantasy' is therefore strictly correlative to identification with a sinthome. (SO, 123-124) [In other words, "what Lacan calls 'going-through the fantasy' consists precisely in the experience of such an inversion apropos of the fantasy-object: the subject must undergo the experience of how the ever-lacking object-cause of desire is in itself nothing but an objectivation, an embodiment of a certain lack; of how its fascinating presence is here just to mask the emptiness of the place it occupies, the emptiness which is exactly the lack in the Other — which makes the big Other (the symbolic order) perforated, inconsistent." (SO, 195)]